IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA,

Plaintiff and Respondent,

v.

WILLIAM CLINTON CLARK,

Defendant and Appellant.

CAPITAL CASE

S066940

Orange County Superior Court No. 94CF0821
The Honorable Jean Rheinheimer/John J. Ryan, Judges

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TABLE OF CONTENTS

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TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

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TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

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TABLE OF CONTENTS (continued)

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TABLE OF CONTENTS (continued)

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TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF CONTENTS (continued)

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES (continued)

TABLE OF AUTHORITIES (continued)

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Other Authorities

TABLE OF AUTHORITIES (continued)

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THE PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, **v.** **WILLIAM CLINTON CLARK,** Defendant and Appellant.	**CAPITAL CASE** S066940

STATEMENT OF THE CASE

On March 27, 1996, the Orange County District Attorney filed a second amended information charging appellant Clark with two counts of murder (Counts 1 and 7: Pen. Code, § 187, subd. (a)); second degree burglary (Count 2: Pen. Code, § 459); three counts of attempted second degree robbery (Counts 3, 4, and 5: Pen. Code, §§ 664/211), and conspiracy to commit murder (Count 6: Pen. Code, § 182). The information further alleged as to each count that a principal was personally armed with a firearm (Pen. Code, § 12022, subd. (d)) and that Clark had served five prior prison terms (Pen. Code, § 667.5, subd. (b)). The information also alleged a number of special circumstances under Penal Code section 190.2, including: 1) that Clark committed murder while in the commission of burglary (Pen. Code, § 190.2, subd. (a)(17)); 2) that Clark committed murder while in the attempted commission of robbery (Pen. Code, § 190.2, subd. (a)(17)); 3) that Clark committed murder while lying in wait; 4) that Clark murdered a witness for the purpose of preventing her from testifying in a criminal proceeding (Pen. Code, § 190.2, subd. (a)(10)); and 5) that Clark was convicted of more than one murder in the present proceeding (Pen. Code,

§ 190.2, subd. (a)(3)). (7 CT 2467-2472.) Clark pled not guilty and denied the special allegations. (7 CT 2476.)

The guilt phase of Clark's trial commenced on March 27, 1996. (7 CT 2476-2478.) On May 14, 1996, Clark admitted the five prior-prison-term allegations. (7 CT 2605-2607.) On May 21, 1996, the jury found Clark guilty as charged and found the firearm and special circumstance allegations to be true. (8 CT 2772-2790.)

The penalty phase of Clark's trial began on June 24, 1996. (8 CT 3054.) On July 11, 1996, the trial court granted Clark's motion for a mistrial at the penalty phase based on the jury's indication of its inability to reach a unanimous decision. (9 CT 3228-3230.) On July 26, 1996, the prosecution informed the court and counsel that it would retry the penalty phase. (9 CT 3285.)

The penalty phase retrial commenced on September 15, 1997. (12 CT 4636.) On October 27, 1997, the jury returned a verdict of death. (13 CT 4868; 14 CT 5188-5189.)

On December 23, 1997, Clark filed a motion to modify his sentence. (14 CT 5214-5225.) On December 24, 1997, Clark filed a motion for a new trial. (14 CT 5226-5254.) On December 29, 1997, the trial court heard and denied both motions, sentenced Clark to a determinate term of nine years in state prison, and entered a judgment of death. (14 CT 5317-5335, 5343.)

This appeal is automatic.

STATEMENT OF FACTS

Clark was convicted and sentenced to death for the murders of Kathy Lee and Ardell Williams. On the evening of October 18, 1991, Lee was waiting for her son Peter to leave work at the electronics store in Orange County where he worked. Unbeknownst to her, the store was being robbed. When she went to check on her son, she was shot in the head by the robber.

Williams went to the authorities and implicated Clark as the mastermind of the robbery that resulted in Lee's murder. While confined in the Orange County Jail, awaiting trial for Lee's murder, Clark was in possession of transcripts and reports relating to Williams's cooperation with police. Clark's girlfriend located Williams and, using an alias, arranged for Williams to come to a job interview on the morning of March 13, 1994. Williams was later found by a passerby shot execution style at the interview site. Clark's girlfriend visited him in jail shortly after the murder.

Clark's defense at trial was one of alibi. In mitigation, Clark argued lingering doubt as to his guilt and presented evidence that he had received various head injuries prior to the murders, resulting in frontal lobe damage to his brain, and was affected by bipolar affective disorder. Clark also presented evidence of his good character and ability to be a role model to other inmates in prison.

Guilt Phase

Prosecution Evidence

The Comp USA Robbery And The Murder Of Kathy Lee

At about 10:00 p.m. on the evening of October 18, 1991, cashier Peter Lee was straightening up displays after the Comp USA store located in Fountain Valley had closed to the public at 9:00 p.m. when a man, later identified as Nokkuwa Ervin, approached him from the back of the store, put a gun to his temple and told him "not to say anything or he [would] blow [his] fucking head off." (47 RT 8341-8347.) Ervin gestured for Lee to follow him to the back of the store, where he ordered him to lie on his stomach and handcuffed him. Ervin asked if anyone else was in the store and Lee told him there were two people in the office. Ervin left briefly and returned about 30

seconds later, lifting Lee to his feet by his handcuffs and ordering him to stand by the office. (47 RT 8347.)

Comp USA head cashier Arlen Nydam was in the office in the store with manager William Doehr adding up daily sales totals when Ervin entered the office with a gun. Ervin put the gun up to the base of Doehr's skull, and said, "Don't move or I'll kill you," and ordered Doehr and Nydam to lie down on the floor. (47 RT 8298, 8303-8306, 8310; 48 RT 8521-8523, 8525.) Ervin handcuffed Nydam and Doehr together and then ordered them to stand outside the office with Lee. (47 RT 8306, 8348; 48 RT 8526-8528.) After searching their pockets and taking the master key to the store from Doehr, Ervin handcuffed the three together in the restroom. (47 RT 8306-8308, 8348; 48 RT 8530-8534.) He returned a short while later saying that the master key did not work. After Doehr assured him that it was the correct key, Ervin left again. (47 RT 8307-8308, 8348; 48 RT 8534-8537.) About a minute later, there was a loud bang and then Ervin returned again to ask if any alarms had gone off. Doehr said no and Ervin left. (47 RT 8348.)

Matthew Weaver,[1/] who had been approached by Clark's brother Eric Clark to help him and Damian Wilson, both players on Weaver's college basketball team, move some computers from what he had been told was Clark's computer store to a warehouse for $100, was riding toward the north side of the Comp USA store in Clark's BMW with Clark and another man from the nearby Del Taco restaurant where the group had rendezvoused, when Weaver saw a woman lying on the ground next to a car. Then Ervin tried unsuccessfully to dive through the driver's window of the BMW. (45 RT 8007-8012, 8023-8029; 46 RT 8044-8056.)

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1. Prosecution witness Matthew Weaver testified pursuant to a grant of transactional immunity. (45 RT 7999-8002.)

Clark, who was driving the BMW, made a U-turn and drove east out of the Comp USA parking lot and onto the freeway as two police cars approached with lights flashing. (46 RT 8057-8060.) Clark exited the freeway on a side street near a car dealership and told Weaver and the other passenger "to get out, you're on your own." (46 RT 8060.) The two got out of the BMW and Weaver called his father from a payphone to come and pick him up. (46 RT 8062-8068; 49 RT 8640-8644.)

At 10:30 p.m. on October 18, 1991, Fountain Valley Police Officer Raymond Rakitis was on patrol near the Fountain Valley Comp USA store when he heard a gunshot. (45 RT 7922-7925.) Officer Rakitis blacked out the lights on his patrol car and made a U-turn into the parking lot of the store. (45 RT 7925-7928.) Officer Rakitis saw a silver BMW begin to back out of the parking lot while Ervin ran toward the car from the direction of an open loading door in the back of the store. (45 RT 7928-7931.) When Ervin reached the car, he tried first to climb in the driver's window and then ran around to try to open the passenger door. (45 RT 7931-7933.)

The BMW stopped backing up and drove eastbound at a high speed and Ervin then ran across the parking lot to the west towards the freeway. (45 RT 7933-7935.) Officer Rakitis had already exited his patrol car and yelled at Ervin to stop or he would send his police dog, Anno. (45 RT 7935-7936.) Anno ran toward Ervin, who then laid down on the ground in a prone position. (45 RT 7936-7937.) Officer Rakitis approached Ervin with his gun drawn and, as soon as he took control of Anno, radioed for backup. (45 RT 7937-7940.) As Officer Rakitis did so, he noticed a woman lying on her back, blood pooling under her head, by a Volvo station wagon parked at the loading dock. (45 RT 7940-7942.) The woman, Kathy Lee, had come to pick up her son Peter from work. (47 RT 8342-8344, 8357.) An autopsy later determined that Lee died as the result of a single gunshot wound to the head, fired while the weapon was directly touching her skin behind her left ear. (47 RT 8412-8420.)

Another officer, Sergeant Griswold, arrived at the parking lot about 30 seconds later and handcuffed Ervin. (45 RT 7939-7940.) Sergeant Griswold searched Ervin and recovered a two-inch, blue-steel .38 revolver from the left inside pocket of his suit coat. (45 RT 7942-7943.) The cylinder of the revolver contained one spent cartridge casing and some human tissue. (47 RT 8377-8380, 8390-8391, 8400-8401.) Ballistic testing later determined that the bullet recovered from the head of Kathy Lee during her autopsy was fired by the revolver found on Ervin's person. (47 RT 8384, 8387-8395.) Gunshot residue was also found on the gloves Ervin wore at the time of his arrest. (47 RT 8381-8383, 8402-8404.) Doehr and Nydam later identified Ervin as the man who had held them at gunpoint. (47 RT 8310; 48 RT 8539.)

After arresting the man in the parking lot, the officers sent Anno inside the Comp USA store to search for other suspects. (45 RT 7943-7944.) Anno alerted on the restroom door and the officers found the three store employees handcuffed in the handicapped stall in the men's room (Nydam, Doehr, and Lee). (45 RT 7944-7945; 47 RT 8309, 8327-8328, 8349; 48 RT 8538-8539.) The officers also found a janitor who locked himself in an office upstairs. (45 RT 7944; 56 RT 9730.)

The following Monday, Weaver spoke to Wilson at basketball practice about the Comp USA incident. Wilson told him that nothing happened and not to worry about it. (46 RT 8073-8074.) Although Eric Clark called Weaver's parents' house a number of times after the Comp USA incident, the two did not speak and Clark quit the basketball team about a week later. (46 RT 8074-8080.) About a week later, Weaver told his girlfriend, Tina Jones, about the incident at the Comp USA. (46 RT 8069, 8080-8082; 48 RT 8566-8570.)

On October 22, 1991, Fountain Valley Police Lieutenant Robert Mosley was getting his hair cut when he noticed a U-Haul parked nearby, approximately 100 yards from the Comp USA store. (45 RT 7992-7993, 7996-7997.) The people in the barber shop indicated that the U-Haul had been

parked there for several days. (45 RT 7994.) The U-Haul truck found near the Comp USA store was identified as the same truck rented on October 3, 1991, at Clark's request by Jeanette Moore[2/] using a false driver's license Clark had obtained for her.[3/] (43 RT 7645-7646, 7649-7654, 7667-7677, 7679-7683, 7714, 7720-7721; 45 RT 7869-7897; 49 RT 8630-8632.) On October 9, 1991, a Black male who could have been Ervin had gone to the U-Haul lot in Glendale and indicated that he would need the U-Haul truck for a longer period of time. (45 RT 7890-7894, 7897-7898.)

Moore moved to Arizona in 1992 or 1993 and did not see Clark again. (43 RT 7683-7684.) However, while living in Arizona in 1993, Moore received a three-way phone call from Gary Jackson and a woman who identified herself as Nina who claimed to be Clark's wife. (43 RT 7693-7696.) Nina asked Moore how she and her family were doing and told her to expect something from Western Union. (43 RT 7697-7697.) Moore later received a $100 wire from Western Union. (43 RT 7696-7697, 7700-7702.) Moore continued to receive phone calls from Nina, inquiring if she had received the money from Western Union and asking about her and her family. (43 RT 7698-7700, 7722.)

In February 1992, the Fountain Valley Police Department received an anonymous letter implicating Weaver, Clark, and his brother Eric Clark in the Comp USA robbery and murder. (49 RT 8622-8623.)

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2. Prosecution witness Jeanette Moore testified pursuant to a grant of transactional immunity. (43 RT 7640-7643.)

3. Clark also provided Moore with credit cards in the same name that she used to make purchases for Clark at a number of stores. (43 RT 7661-7662, 7664.) These purchases included men's clothes and shoes and items for Clark's girlfriend purchased from Saks Fifth Avenue and telephone book calculators and portable televisions purchased from Circuit City. (43 RT 7664-7666.)

The Murder Of Ardell Williams

At around 9:20 p.m., sometime in August or September of 1991, Clark called Ardell Williams[4/] and invited her to get something to eat. (50 RT 8739-8740.) In 1990, Williams had helped Clark steal $10,000 worth of laptop computers from Soft Warehouse in Torrance, where she worked as a cashier. (48 RT 8585-8594; 49 RT 8613-8615.)

Clark picked Williams up outside her home in his bronze BMW and he drove her to a Del Taco restaurant near a Comp USA store in Fountain Valley. (50 RT 8741-8747, 8756-8757.) The two got their food and began eating in Clark's car when Williams told Clark that he did not "bring [her] out here just to eat nachos," since there was a Del Taco around the corner from her home. (50 RT 8747-8748.) When Williams noticed the Comp USA, she asked "by any chance is this computer store going to be in the news any time soon?" Clark laughed and continued eating. (50 RT 8747.)

Sometime around 10 p.m., Clark's brother Eric and Damian Wilson, who Williams knew as Clark's cousin Marc, pulled up in Clark's Isuzu Trooper. (50 RT 8737-8739, 8747-8748, 8751.) Clark and his brother conversed briefly and the group watched the Comp USA approximately 500 feet away from their parked cars. (50 RT 8748, 8751-8758.) They could see people moving around inside the store and Eric said, "Damn, they are still in there," to which Clark responded that they were "probably just clocking out." (50 RT 8752-8755.) While the group watched the store, Williams saw a number of employees leave the store for the evening. (50 RT 8752-8758.)

The group eventually left the parking lot and drove to a nearby cul-de-sac, where they parked their cars by a U-Haul. (50 RT 8758-8761.) Clark got out of the BMW and spoke briefly to Eric and Wilson before

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4. Ardell Williams's grand jury testimony was read to the jury at Clark's trial. (50 RT 8731-8796.)

returning to rummage through his briefcase looking for a key. (50 RT 8761-8763.) Clark eventually found the key that he was looking for on the dashboard of the BMW and then he left the BMW, got in the U-Haul, and moved it closer to the BMW. (50 RT 8763-8764.) After Clark moved the U-Haul, Eric and Wilson left in Eric's Isuzu, and Clark returned to the BMW, where he replaced the key on the dashboard. Clark and Williams drove away soon after. (50 RT 8764.) As Clark got on the freeway, Williams said, "Don't tell me, is this going to be your next target?" Clark smiled and said, "Pretty much." (50 RT 8764-8766.)

At the end of September, Clark accompanied Williams to Las Vegas, where they were both subsequently arrested and convicted for going to the Mirage Hotel and passing stolen traveler's checks. (50 RT 8782-8783; 51 RT 8871-8882, 8942-8947, 8963-8966; 58 RT 10052-10055.) Williams cooperated with police and the FBI in their investigation of the incident and other related bad check cases. (51 RT 8950-8963; 52 RT 9085-9101.) During her conversations with the FBI regarding the stolen traveler's checks, Williams told FBI Special Agent Todd Holliday that "she was scared of [Clark] finding out that she was talking" because "she was afraid of [Clark]," who she said was "violent" and "dangerous." Williams indicated that "she believed that she would be killed if he found out that she was talking." (52 RT 9094-9095.)

About a month after accompanying Clark to the Del Taco in Fountain Valley, Williams received a phone call at her home in Gardena from Eric Clark, asking if he could come see her. (50 RT 8777-8778.) When he arrived, Eric asked Williams if she had talked to anyone about the "Las Vegas thing" because someone was "pointing the finger, Las Vegas, at [Clark]" and "they think [Clark] is top dog in this case." Williams denied that she had talked to anyone. (50 RT 8779.)

Eric appeared nervous during their conversation and Williams asked, "[W]hatever happened to the computer store?" He replied that "it went down

bad." He said that they handcuffed a cashier and a night manager in the bathroom, but that an employee's mother who wondered why it was taking so long to close the store surprised him and he shot her. Eric told Williams not to say anything to anyone about what he had told her. (50 RT 8780-8782.)

A week and a half after speaking to Eric, Clark called Williams. (50 RT 8789-8790.) Clark was aware that Williams had been in jail in Las Vegas and told her that he would get her a lawyer and that he would take care of everything. (50 RT 8790-8791.) During their conversation, Williams asked what had happened to Clark's BMW and he said that he had sold it because "you never know who could have seen the two of [them] sitting eating nachos that one night" and "[h]e didn't want anybody to suspect anything." (50 RT 8791-8793.)

On December 31, 1991, after learning about the Comp USA robbery and murder from Eric, Williams contacted FBI Special Agent Todd Holliday, who she had first encountered during the bad check incident in Las Vegas, and told him about Clark driving her to the Del Taco in Fountain Valley and about her subsequent conversation with Clark. (50 RT 8783-8789; 52 RT 9101-9107.)

Special Agent Holliday contacted Fountain Valley police and Orange County District Attorney's investigators to inform them that Williams claimed to have information about the Comp USA robbery and murder. (49 RT 8624-8626; 52 RT 9101-9107, 9126-9128, 9201-9202.) Based on this information, Investigator Frank Grasso called Williams on the morning of April 1, 1992. During this interview, Williams implicated Clark in the Comp USA robbery and murder. (14 CT 5410-5448; 49 RT 8626-8627, 8632-8637.)

In August 1992, Ardell Williams's sister Liz Fontenot used a tape recorder provided to her by Investigator Grasso to record collect calls she received from Clark while he was in custody in Las Vegas. (53 RT 9241, 9244-9252.) During these conversations, Clark told Fontenot that he was concerned that the authorities were trying to link him to a crime in Orange

County and that he believed Williams was cooperating with the police. (14 CT 5346-5408.) Clark said that the authorities knew things that only Williams knew and "it kinda shocked me" and "I kind of put two and two together." (14 CT 5356.) Clark was "shocked" that Williams "rolled over so quickly" and it made him "immediately say, never do nothing with her again." (14 CT 5362.)

Clark told Fontenot that if Williams testified against him it would "just kinds like wipe me out." (14 CT 5361.) Clark told Fontenot that "the best answers [Williams] could tell them about me is I don't know." (14 CT 5380.) Clark explained, "[y]ou're her big sister, she don't know nothing about me. Whatever she's told them, that's it. You follow me?. . . She can I don't know 'em to death. (14 CT 5385.) In Clark's words, "Anything she has might of already said, she could come to court and get complete amnesia." (14 CT 5387.)

While in Orange County Jail awaiting trial for the Comp USA robbery and murder of Kathy Lee, Clark showed a trial transcript referencing Ardell Williams to another inmate. (56 RT 9679-9683.) Clark told the inmate, "This is the woman right here that could put me away." (56 RT 9715.) Criminal Defense Attorney John Barnett testified as an expert witness that a competent defense attorney would have communicated the information relating to William's interviews with police and grand jury testimony provided by the prosecution as discovery to Clark. (58 RT 10018, 10035-10036.) According to Barnett, William's interviews and grand jury testimony would be generally inadmissible at trial if Ardell Williams was unavailable as a witness because she had not been subject to cross-examination. (60 RT 10045-10046.)

On March 9, 1994, Williams contacted Investigator Grasso and told him about receiving a flower delivery on February 10, at the Gardena home where she lived with her mother and sister bearing a card signed "Secret Admirer." The flowers were delivered by a woman who claimed to be from a local flower shop. Williams indicated that no one had come forward to acknowledge

sending the flowers and she was concerned they could be related to the case. (50 RT 8806-8808; 53 RT 9300-9310; 54 RT 9440-9447.)

Investigator Grasso put together a series of photographs of women known to be associated with Clark, including Clark's girlfriend Antoinette Yancey, and went to Williams's home, where he showed the photographs to Williams, her mother, and her sister. (50 RT 8808-8810.) All three identified Yancey as the person who had delivered the flowers. (50 RT 8812-8814; 53 RT 9308-9310; 54 RT 9447-9449.)

Shortly after speaking to Investigator Grasso regarding the flower delivery, Williams was contacted on the phone by someone calling herself Janet Jackson, who had spoken by phone several times to William's mother and who was interested in having Williams interview for a job at Continental Receiving at 6:30 a.m. on Sunday, March 13, 1994. (53 RT 9314-9321; 54 RT 9449-9470.)

Williams went to the job interview sometime after 6:00 a.m. on the morning of March 13. (54 RT 9471-9472.) At 8:00 a.m., William's body was discovered near her car in the driveway of Continental Receiving in Gardena, about a two-minute drive from her home. (54 RT 9513-9521; 55 RT 9550.) Williams had a gunshot wound behind her left ear. (55 RT 9548-9549; 56 RT 9752-9754.) A .25 caliber cartridge casing and a number of job application forms were found near Williams's body and $114 in cash and jewelry was found on her person. (54 RT 9521-9526.)

Yancey visited Clark at the Orange County Jail on the morning of March 13, 1994. The visit began at 8:45 a.m. and ended at 9:35 a.m. (60 RT 10155.) According to Investigator Grasso, it took 37 minutes to drive from Continental Receiving to the Orange County Jail observing the speed limit. (59 RT 10100.)

On March 17, 1994, police searched Antoinette Yancey's apartment. (55 RT 9552.) During the search police found a California driver's license with Yancey's picture on it in the name of Keia Thomas and a resume with the name

Keia Thomas. (55 RT 9556-9558.) Police also found a Western Union receipt for $100, sent to Jeanette Alexander from Nina Howard on December 27, 1993. (55 RT 9558.) Police found an income tax return and receipts in Clark's name and a receipt in Eric Clark's name. (55 RT 9558-9559.) There was also a file marked "Billy" and numerous letters from Clark to Yancey in the apartment. (55 RT 9565-9581.)

In a voice lineup, Williams's mother and sister identified Antoinette Yancey's voice as being that of Janet Jackson. (54 RT 9409-9412, 9499-9502; 55 RT 9586-9591.) Williams's mother and sister also identified Yancey in a photo lineup as the person who had delivered the flowers to Williams. (55 RT 9591-9594.) Yancey's fingerprints were also found on the box the flowers were delivered in. (57 RT 9951.)

Yancey's phone records for the period of January through March 1994 indicated numerous calls to Clark's attorney, his investigator, a pay phone in the Orange County Jail accessible to Clark, and to Ardell Williams's home. (60 RT 10156-10157.) After her arrest, Yancey spoke to a friend on the phone and told him that she had been arrested because she had delivered flowers to someone who was later found murdered. (56 RT 9636-9637.)

Defense Evidence

Clark's defense focused on attacking the credibility of Ardell Williams and an alibi for the time of the Comp USA robbery and murder.

As regards Ardell Williams, neuropsychologist Satanand Sharma indicated that she had seen Williams in her clinic four times. (61 RT 10271.) Sharma stated that, during these visits, Williams told her that she had gone to dinner with an ex-boyfriend named Bill and that after dinner they had stopped to rob a computer store in Fullerton and shot a clerk. Williams indicated that she was present during the robbery. (61 RT 10272-10273.)

The loss prevention officer at the Disney Stores in Torrance also described an employee theft investigation at the store that resulted in Ardell Williams's termination in February 1994. (60 RT 10163-10169; 64 RT 10690-10691.)

With respect to Clark's alibi for the Comp USA robbery and murder, musician Geoffrey Gilstrap testified that, in October 1991, Clark was the manager of his band Full Swing and would arrange time for the group in a Glendale recording studio. (62 RT 10405-10407, 10505-10509.) On the evening of either Friday, October 18, or Friday, October 25, Gilstrap was summoned to the studio, arriving at approximately 8:30 p.m., because he was informed that the band had a recording session scheduled. Clark was at the studio and asked why the band was not recording. Gilstrap explained that there was an ongoing pay dispute with the band's engineer. Gilstrap left the studio about 15 to 20 minutes later. (62 RT 10410-10417, 10517-10524.) The manager of the recording studio presented the studio's schedule book, which indicated that Clark had booked the studio on October 12, 13, and 18, 1991. (62 RT 10466-10471.) However, she did not remember Clark being in the studio on October 18, 1991. (62 RT 10479.)

Penalty Phase Retrial

Prosecution Evidence

At the penalty phase retrial, the prosecution re-presented the guilt phase evidence relating to both the Comp USA robbery and murder of Kathy Lee and the murder of Ardell Williams. (77 RT 13213-85; 85 RT 15256; 88 RT 16198-16210; 89 RT 16389-16397.)

Defense Evidence

The focus of Clark's case in mitigation was lingering doubt as to his guilt. To this end he again attacked the credibility of a number of the

prosecution witnesses and presented evidence of his alibi. Clark also presented mitigating evidence relating to his family background, good character, and ability to be a positive influence on other inmates in the state prison system, as well as detailing a number of head injuries he had sustained as a child and young adult and the resulting brain damage and psychological impairment that he exhibited.

Gary Jackson testified that he dated Jeanette Moore for about six months from 1990 to 1991. (85 RT 15282-15283.) During this time, the two regularly used cocaine together and shoplifted. (85 RT 15283-15286.) On one occasion when the two were together, Moore found a wallet outside a carwash in Los Angeles. The wallet contained credit card receipts from Saks Fifth Avenue and May Company in the name of Dena Carey. (85 RT 15286-15288.) Moore then outlined a plan to Jackson whereby she would obtain a driver's license in Dena Carey's name and use the license to obtain credit using the credit card receipts. (85 RT 15288-15289.)

Jackson introduced Moore to Clark in May of 1991. (85 RT 15296.) Although the two never discussed anything illegal in front of Jackson, Moore did ask if she could use Clark's address to have checks sent to her. (85 RT 15296-15302.)

Jackson claimed that one of his "dope dealers" named Ricky who was a light-complected Black man who stood approximately 5'10" and wore his hair in a gheri curl paid Moore $100 to rent the U-Haul truck in October 1991. (85 RT 15289-15291, 15309-15315.) Ricky drove a grey BMW and Jackson had also seen Ricky drive a U-Haul truck. (85 RT 15291-15295.)

Anthony Miller, a loss prevention officer at the Disney Stores where Ardell Williams had worked in 1994, testified about learning that Williams had an undisclosed prior criminal conviction and that she had been involved in the theft of merchandise from the store, which resulted in her dismissal. (86 RT 15518-15534.) Williams's probation officer also testified about Williams's

numerous violations of the conditions of her probation. (88 RT 16116-16132.)

Clark also re-presented his alibi defense from the guilt phase. (88 RT 16040-16061, 16062-16082, 16147-16198; 89 RT 16369-16376.)

Bobby Grissom, a retired community activist, testified that he had known Clark for 20 years, although he had not seen him out of custody since the mid to late 1980's. He said that Clark had become involved in volunteer work through the activities of his mother. (86 RT 15567-15570, 15574.) Although Clark's mother was a very demanding person, she never had problems with Clark, who would help her both with her volunteer work and with some apartments that she owned. (86 RT 15571-15572.)

Clark's father married his mother when he was 19 years old and the two were married for 10 years. (86 RT 15587-15588, 15700-15702.) Clark and his brother Jonathan were born to the couple during the marriage. (86 RT 15588-15589, 15702.) When Clark was six or seven, he was hit over the head with a champagne bottle, causing him convulsions, which resulted in his being taken to the doctor. (86 RT 15740-15741.)

Clark's father was an alcoholic and, during the 10 years Clark's mother and father were married, the two had numerous verbal and physical altercations. (86 RT 15590-15594, 15751-15752.) Clark's father was also hospitalized for a month for a nervous breakdown during this period. (86 RT 15598-15600.) The animosity between the two became so great that Clark's father left his mother in 1962. (86 RT 15595.) Thereafter, Clark and his brother spent weekends and summers with their father. (86 RT 15598.)

During his elementary and junior high school years, Clark played sports, was fun, respectful, never aggressive and did not get into trouble. (86 RT 15632-15634, 15703, 15711, 15718, 15744, 15752-15753.) Clark continued to play basketball, playing guard and forward on his high school basketball team. (86 RT 15635, 15704, 15721.)

Clark's father remarried and had two more children, Clark's half-brothers Eric and Jason. (86 RT 15600-15602.) Clark had a good relationship with his brothers and would play basketball and tennis with them. (86 RT 15602.)

Clark graduated from high school and attended UCLA, leaving college shortly before completing his bachelor's degree. (86 RT 15603, 15637, 15723-15724.) Clark's father moved to Fresno with his wife and two young sons and Clark moved in with them, attending Fresno State University. (86 RT 15603-15605, 15724.) Clark tripped on a lawn sprinkler and broke his jaw and leg while playing football at Fresno State. (86 RT 15605, 15725, 15744-15745.)

Clark left Fresno and returned to Los Angeles and moved into an apartment building owned by his mother. (86 RT 15606-15607, 15637-15638.) During this time, Clark got married, had two children, and was in a car accident that resulted in him being in a body cast for six months. (86 RT 15657-15661, 15727-15728.)

Clark had one daughter from his first marriage and a son and daughter from his second marriage. (86 RT 15572, 15612-15615, 15638-15639, 15652, 15658.) A second child from Clark's first marriage died at the age of four of asphyxiation. (86 RT 15612-15613, 15668.) Clark was very good with children and was a good father, always kind, compassionate, and patient. (86 RT 15573-15574, 15616, 15658-15659, 15678-15680, 15689-15690, 15689-15690.)

While in Los Angeles, Clark engaged in a number of business ventures, making logos for T-shirts, building clocks and putting cigarette advertisements on cars. (86 RT 15641.) Clark and his brother Jonathan also started a business venture to design and license animated characters for the 1984 Olympic Games, using $500,000 to $750,000 borrowed from his mother and aunt. (86 RT 15609-15612, 15639-15640, 15661-15662, 15681-15683, 15690-15691,

15704-15705, 15729-15731.) The business venture was a failure. (86 RT 15610-15611, 15642, 15662-15664, 15683, 15731.)

After the failure of his business venture, Clark's behavior changed. Clark, who had been a fun, outgoing, easy going person, became "remorseful" for losing his mother's money and would have more significant "ups and downs." (86 RT 15611-15612, 15642, 15662-1664, 15683, 15731.) Clark became evasive and distant and this led to his first wife seeking a divorce. (86 RT 15662-15667.) However, Clark was always polite, respectful, and never angry or violent. (86 RT 15642, 15685, 15706-15707.)

Clark's four-year-old son died soon thereafter, followed in close succession by his brother-in-law and grandmother. These deaths "really affected" Clark. (86 RT 15668-15671, 15732.)

Inmate William Reynolds met Clark in late 1991 or early 1992 while incarcerated in the Orange County Jail. (86 RT 15756-15763.) Based on his 37-month acquaintance with Clark in the jail, Reynolds described him as an "older statesman . . . [w]ise, wiser, bright, someone you can talk to." (86 RT 15766-15767.) Clark had a mild demeanor in jail and was someone who could relate with younger inmates and help diffuse racial tensions in the jail. (86 RT 15767-15770.) Clark got along with everyone in the Orange County Jail, both guards and inmates. (86 RT 15770-15771.) Reynolds also explained that it was common for inmates to write sexually explicit letters. (86 RT 15771-15779; 88 RT 16020-16026.)

Twenty-one-year-old state prison inmate Thomas Yandall, who had been incarcerated with Clark in the Orange County Jail, indicated that he had entered jail with a "black heart" and had a lot of disciplinary problems, but that Clark had helped him to realize that he was wasting his life and encouraged him to take advantage of the educational opportunities in the state prison system. (88 RT 16004-16009.) As a result, Yandall attended vocational classes and

obtained a degree in plumbing and got a job as a state prison inmate doing plumbing work. (88 RT 16010-16013.)

State prison inmate Marcos Enriquez met Clark while the two were incarcerated together in the Orange County Jail. (89 RT 16230.) Enriquez described the racial problems between Black and Hispanic inmates in the prison system and indicated that Clark was the only Black inmate he had ever gotten along with during his 16 years of incarceration. (89 RT 16224-16231.) Enriquez attributed this to Clark being "mild mannered" and "respectable." (89 RT 16231.)

Sentencing consultant Norman Morein testified regarding the security classification system in state prison and the way in which inmates are classified for security purposes. (89 RT 16350-16364.)

Joseph Wu, the director of the Brain Imaging Center at UC Irvine, testified that he had conducted a PET scan of Clark's brain on June 11, 1996. (87 RT 15806-15807, 15821-15822.) The scan revealed abnormalities in the Brodman areas 9, 10, and 46 in the frontal lobes of Clark's brain consistent with a closed head injury and demonstrating lower metabolism and a lack of function in the damaged areas. (87 RT 15836-15837.) The scan also showed damage to the caudate and putamen in the inner layers of Clark's brain, as well as damage to the Brodman areas 17, 18, and 19 in the back of Clark's brain, both of which were consistent with frontal lobe damage associated with a closed head injury. (87 RT 15837-15840.)

Wu opined that the abnormalities in Clark's brain detected by the PET scan indicated that Clark had "suffered some kind of serious blow to the head which caused some kind of severe malfunction of his frontal lobes." (87 RT 15840, 15843-15844.) The damage observed on the PET scan was consistent with Clark being struck on the head with a champagne bottle at the age of six. (87 RT 15846-15847.) People with frontal lobe damage can be depressed and "seem to lack the ability to be able to fully understand or appreciate the

significance of their actions and to have impaired social judgments." (87 RT 15844-15845.)

Psychiatrist George Woods conducted a clinical assessment of Clark. (87 RT 15916-15919.) Based on this clinical assessment, Woods concluded that Clark had a bipolar affective disorder.[5/] (87 RT 15919.) Bipolar affective disorder is a mood disorder and affected individuals experience periods of elevated mood, are easily distracted, and lack good insight into their actions. (87 RT 16921.) The diagnosis of bipolar affective disorder was consistent with the injuries and frontal lobe damage observed in the PET scan of Clark's brain. (87 RT 15937-15942.)

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5. Woods explained that a bipolar affective disorder is also commonly referred to as manic depressive disorder. (87 RT 15919.)

ARGUMENT

I.

THE ORDER DENYING CLARK TELEPHONE ACCESS FROM THE ORANGE COUNTY JAIL DID NOT VIOLATE HIS SIXTH AMENDMENT RIGHT TO COUNSEL

Clark contends that a March 23, 1994, order denying Clark access to the jail telephone[6/] (I Municipal Court (MC) RT 3-7, 11, 15; 1 Municipal Court (MC) CT 5) prevented him from communicating with his counsel, investigator, and potential witnesses in the case, thereby violating his rights to counsel and to prepare his defense under the Sixth Amendment and California law. (AOB 26-32.) This claim is without merit, as Clark forfeited the issue on appeal and, regardless, the order denying him telephone access was reasonably related to legitimate penological interests.

First, Clark's counsel expressly waived any objection to the order denying him telephone access. A criminal defendant's counsel "has general authority to control the procedural aspects of the litigation and, indeed, to bind the client in these matters." (*In re Horton* (1991) 54 Cal.3d 82, 94.)

At an April 15, 1994, hearing regarding the order, Clark's counsel expressly declined to challenge it, indicating that he could "deal with [Clark] on that issue at the preliminary hearing." (I MCRT 41.) As the order only restricted the procedure by which communication between Clark and counsel could occur, and not the frequency or content of that communication, this was simply an issue of pretrial procedure to which Clark's counsel expressly

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6. On March 17, 1995, the court modified the order to allow Clark to have private telephone calls with his attorney and investigator from 3:00 to 6:00 p.m., Monday through Friday, so long as a deputy dialed the number. (1 CT 192, 198.)

acquiesced on his behalf. Accordingly, Clark has forfeited any challenge to the original order based on his counsel's statements at the April 15, 1994, hearing.

However, even assuming the claim is properly before this Court, the order did not violate Clark's Sixth Amendment rights. Although the Sixth Amendment guarantees a criminal defendant the right to communicate privately with counsel, correctional authorities may implement reasonable restrictions on contacts between attorney and client pursuant to Penal Code section 2600, which provides that a prisoner may be deprived of certain rights where "reasonably related to legitimate penological interests.[7]" (Pen. Code, § 2600; *Small v. Superior Court* (2000) 79 Cal.App.4th 1000, 1010-1011, citing *Turner v. Safley* (1987) 482 U.S. 78 [107 S.Ct. 2254, 96 L.Ed.2d 64].)

A trial court's order relating to the deprivation of a prisoner's rights under Penal Code section 2600 is reviewed for an abuse of discretion. (See *id.* at p. 1014.) The trial court cannot exercise its discretion arbitrarily, but " 'must be grounded in reasoned judgment and guided by legal principles and policies appropriate to the particular matter at issue.' " (*Ibid.*)

When considering whether a deprivation of a prisoner's rights is proper under Penal Code section 2600, a reviewing court should consider such factors as:

> (1) whether there is a "'valid, rational connection' between the prison [restriction] and the legitimate governmental interest put forward to justify it"; (2) whether there are alternative means of exercising the right; (3) how the accommodation of the asserted right will impact

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7. Although Penal Code section 2600 refers to persons sentenced to state prison, this Court has previously held that the section is equally applicable to those in pretrial detention. (*De Lancie v. Superior Court* (1982) 31 Cal.3d 865, 872, superceded by statute on other grounds as recognized in *People v. Loyd* (2002) 27 Cal.4th 997, 999.)

guards, other inmates and the allocation of prison resources; and (4) whether the restriction is an "'exaggerated response'" to prison concerns. [Citation.]

(*Small v. Superior Court*, *supra*, at p. 1011.)

Each of these factors supports the trial court's order denying Clark telephone access. As the prosecutor explained to the trial court when seeking the order, Clark was being prosecuted for the murder of Ardell Williams, who was to be a key witness against him in the Comp USA murder case. Clark was a prisoner in the Orange County Jail at the time of Williams's murder and the evidence indicated that Clark and Yancey had plotted the murder during his incarceration and had used the jail telephones to do so. The order was essential for witness safety. (I MCRT 4-5.)

The United States Supreme Court has recognized public safety and institutional security as a legitimate penological interest. (*Turner v. Safley*, *supra*, 482 U.S. at p. 91.) Here, the government's interest in protecting the lives of other witnesses and preventing the Orange County Jail telephone system from being used to arrange additional murders of witnesses was rationally related to, and directly served by, the order prohibiting Clark from using the jail telephones.

Alternative means were available to Clark to communicate with his attorney, investigators, and potential witnesses. The order only restricted Clark's telephone access. He was still able to communicate in person, through visitations at the jail, and in writing. Based on Clark's counsel's statements at the April 15, 1994, hearing, any restriction on the method of Clark communicating with his defense team was not insurmountable. (I MCRT 41.) Indeed, Clark made no further complaint about the order until almost a year later. (1 CT 184-190.)

Finally, restriction of Clark's telephone access was a wholly proportionate response to his use of the telephone system to arrange Williams's

murder. The order left him with multiple avenues of communication available and placed no restriction on the frequency or content of those communications. It merely required that those communications occur in the more easily supervised arenas of the jail visitation area and jail mail system. This was no infringement or deprivation of Clark's Sixth Amendment right to counsel.

Nonetheless, even assuming the order was improper, Clark suffered no discernable prejudice and any error was harmless. Generally, a violation of a defendant's Sixth Amendment rights will not result in reversal where the error complained of was harmless beyond a reasonable doubt. (See e.g. *Rose v. Clark* (1986) 478 U.S. 570, 577-579 [106 S.Ct. 3101, 92 L.Ed.2d 460]; *U.S. v. Morrison* (1981) 449 U.S. 361, 365 [101 S.Ct. 665, 66 L.Ed.2d 564]; *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].)

There is absolutely no discernable prejudice apparent from the record. Although Clark alleges that the order interfered with his ability to assist his counsel and investigators in preparing for trial (AOB 28-31; 1 CT 187-190), the record does not substantiate this allegation. Clark contends that it was necessary for him to be able to contact potential witnesses in order to facilitate communications between those individuals and his defense team and that this was particularly essential where many of the witnesses belonged to a different ethnic group than Clark's counsel and investigators. However, he fails to identify a single instance where his defense was hindered by his supposed inability to communicate with potential witnesses, counsel, or his investigators by telephone. Clark's access to potential witnesses and his defense team through jail visitations and mail was unhindered. Indeed, his counsel's statements at the April 15, 1994, hearing suggest this arrangement was entirely adequate. (I MCRT 41.) There is simply nothing in the record to indicate that the order denying telephone access had any effect on the ultimate outcome of the case. Accordingly, in the absence of any prejudice and in light of the

overwhelming evidence of his guilt, any error was harmless beyond a reasonable doubt. (See *Chapman v. California*, *supra*, 386 U.S. at p. 24.)

II.

THE PRELIMINARY HEARING WAS PROPERLY CONTINUED TO MAINTAIN JOINDER

Clark contends that the preliminary hearing was improperly continued over his objection and without good cause. (AOB 33-36.) However, the magistrate properly found that good cause existed to continue the preliminary hearing as to co-defendant Yancey and, under Penal Code section 1050.1, a continuance as to Clark was therefore proper to maintain joinder.[8/]

Penal Code section 859b provides that a criminal defendant has a right to a preliminary hearing within 10 court days of the arraignment or plea, unless the parties waive this right or good cause to continue the preliminary hearing is found pursuant to Penal Code section 1050. (Pen. Code, § 859b; *Landrum v. Superior Court* (1981) 30 Cal.3d 1, 6.) A trial court has broad discretion to determine whether good cause justifies a continuance under Penal Code section 1050 and that determination will not be disturbed absent a showing that the trial court abused its discretion. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037.)

Clark does not contend that co-defendant Yancey's request for additional time to review the large amount of discovery recently provided by the prosecution in order to prepare for the preliminary hearing did not constitute good cause under Penal Code section 1050. (AOB 33; I MCRT 67-68.) Indeed, a trial court considering a request for a continuance may not exercise its discretion in a manner that deprives a criminal defendant or their counsel a

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8. Clark's case was joined to that of co-defendant Yancey until a motion to sever the trials was granted on November 29, 1995, well after the preliminary hearing was completed. (8 RT 1850-1860.)

reasonable opportunity to prepare a defense. (*People v. Snow* (2003) 30 Cal.4th 43, 70.)

Penal Code section 1050.1 provides that where two or more defendants are charged in the same complaint and the magistrate finds good cause to continue the preliminary hearing as to one defendant, "the continuance shall . . . constitute good cause to continue the remaining defendants' cases so as to maintain joinder." (Pen. Code, § 1050.1; see *Tapia v. Superior Court* (1991) 53 Cal.3d 282, 299; see also *In re Samano* (1995) 31 Cal.App.4th 984, 990-993.) Here, the court found good cause to continue the preliminary hearing as to co-defendant Yancey and this finding, in turn, established good cause to continue the preliminary hearing as to Clark for purposes of maintaining joinder. (I MCRT 71.) No abuse of discretion occurred. (See *In re Samano*, *supra*, at pp. 990-993.)

However, even assuming Clark could establish a violation of his statutory right to a speedy preliminary hearing under Penal Code section 859b, he fails to demonstrate the requisite prejudice necessary on appeal. As this Court explained in *People v. Pompa-Ortiz* (1980) 27 Cal.3d 519, 529,

> irregularities in the preliminary examination procedures which are not jurisdictional in the fundamental sense shall be reviewed under the appropriate standard of prejudicial error and shall require reversal only if defendant can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination.

(See also *People v. Stewart* (2004) 33 Cal.4th 425, 461-462.)

Denial of statutory speedy trial rights is one such issue requiring a showing of prejudice on appeal. (See *People v. Pompa-Ortiz*, *supra*, 27 Cal.3d at p. 529, citing *People v. Wilson* (1963) 60 Cal.2d 139.) As the error alleged is one of state law, Clark must demonstrate that, after an examination of the entire cause, it is reasonably probable that he would have obtained a more favorable result but for the error. (See *People v. Watson* (1956) 46 Cal.2d 818, 836.)

Clark utterly fails to identify any possible prejudice that resulted from the magistrate's continuance of the preliminary hearing. (AOB 33-36.) There is nothing in the record to indicate that either he was disadvantaged by, or the prosecution gained some advantage from, the delay in the preliminary hearing. During the lengthy preliminary hearing, the prosecution presented ample evidence to establish probable cause that Clark committed the charged offenses and he fails to identify any evidence of guilt the prosecution would have been unable to present had the preliminary hearing been held earlier. Clark was later tried by a jury and found guilty of the charges by the higher standard of proof beyond a reasonable doubt. Accordingly, it is not reasonably probable that Clark would have obtained a more favorable result had the magistrate not continued the preliminary hearing. (See *People v. Wilson*, *supra*, 60 Cal.2d at p. 154; *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

III.

CLARK'S TRIAL IN ORANGE COUNTY FOR ARDELL WILLIAMS'S MURDER DID NOT VIOLATE HIS VENUE AND VICINAGE RIGHTS BECAUSE HE PERFORMED PREPARATORY ACTS IN ORANGE COUNTY AND ORANGE COUNTY BORE A REASONABLE RELATIONSHIP TO THE MURDER

Clark contends that venue and vicinage in Orange County was improper as to the murder of Ardell Williams because that crime occurred in Los Angeles County and there was no evidence of preparatory acts occurring in Orange County. (AOB 37-43.) However, venue and vicinage in Orange County were proper because substantial evidence established that a number of preparatory acts occurred in Orange County and there was a reasonable relationship between Orange County and Ardell Williams's murder.

Under Penal Code section 790,[9] the proper venue for a murder trial lies in the county where the fatal injury was inflicted, where the victim died, or where the victim's body was discovered. Under Penal Code section 781, venue is also proper in the county where the defendant made preparations for the crime. (*People v. Price* (1991) 1 Cal.4th 324, 385.)

In reviewing a challenge to a venue determination, an appellate court must consider whether the jury[10] could reasonably have concluded by a preponderance of the evidence, based on all the evidence presented, that venue was proper. (*People v. Posey* (2004) 32 Cal.4th 193, 220.) In this case, the trial court properly denied Clark's challenge to venue in Orange County. (6 CT 2092-2097; 14 RT 2859.) The evidence clearly established numerous visits and telephone conversations between Yancey and Clark in the Orange County Jail in the months immediately prior to Williams's murder and the jury could reasonably have concluded that it was during this time that the two planned for Yancey to lure Williams to her death. (60 RT 10157-10158, 10873.) These preparatory acts, performed by Clark at the Orange County Jail, justified his trial in Orange County for the murder of Ardell Williams. (See *People v. Posey*, *supra*, 32 Cal.4th at p. 221 [defendant's multiple phone calls to Marin County from San Francisco County to negotiate drug transaction sufficient to justify venue in Marin under § 781 even though drug transaction occurred in San Francisco].)

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9. Clark's contention that the vicinage clause of the Sixth Amendment were incorporated and applied to the states by the Fourteenth Amendment (AOB 37-38) has been rejected by this Court. (*Price v. Superior Court* (2001) 25 Cal.4th 1046, 1065, 1069.)

10. This Court, in *Posey*, rejected the long-standing rule that venue is a question of fact to be resolved by the jury in favor of the new rule that it is a question of law for the judge. (*People v. Posey*, *supra*, 32 Cal.4th at p. 215.) However, the new rule is only to be applied to those cases brought after the decision in *Posey*. (*Ibid.*)

The evidence similarly supports the trial court's finding that trial in Orange County for Williams's murder did not violate Clark's vicinage rights. As this Court observed,

> the vicinage right implied in article I, section 16 of the California Constitution [citation], constitutes simply the right of an accused to a trial by an impartial jury drawn from a place bearing some reasonable relationship to the crime in question. [Citation.]

(*Id.* at p. 222.)

In this case, the Orange County Jail is where Clark and Yancey planned Williams's murder and Orange County bears a more than reasonable relationship to her murder. Accordingly, being tried by a jury drawn from the residents of Orange County did not violate Clark's vicinage rights. (See *Id.* at p. 223.)

IV.

THE TRIAL COURT PROPERLY DENIED CLARK'S MOTION TO RECUSE THE ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE BECAUSE THERE WAS NO EVIDENCE OF ANY CONFLICT

Clark contends that the trial court improperly denied his motion to recuse the Orange County District Attorney's Office because of its emotional involvement with Ardell Williams, who was to testify in the Comp USA case, and the conflict that this relationship created was disqualifying. (AOB 44-55.) However, the evidence did not support the existence of any conflict and the trial court's denial of the motion was well within the bounds of its discretion.

Penal Code section 1424, subdivision (a)(1) sets forth the standard for a motion to disqualify the prosecutor. Such a motion will only be granted where the evidence " 'shows a conflict of interest that would render it unlikely that the defendant would receive a fair trial.' " (*People v. Snow*, *supra*, 30 Cal.4th at p. 86.) The statute requires a two-pronged showing, that: 1) there is

a conflict of interest and, 2) the conflict is so severe as to disqualify the district attorney from acting as prosecutor on the case. (*Ibid.*)

A conflict of interest exists whenever the circumstances demonstrate " ' "a reasonable possibility that the DA's office will not exercise its discretionary function in an evenhanded manner." ' " (*Ibid.*) However, the existence of a conflict of interest alone is insufficient to justify recusal. The conflict must be so grave as to " ' "render it unlikely that the defendant will receive fair treatment" during all portions of the criminal proceedings.' " (*People v. Snow, supra,* 30 Cal.4th at p. 86.)

A trial court's ruling on a motion to recuse the district attorney is reviewed for an abuse of discretion and any underlying findings of fact are reviewed for substantial evidence. (*People v. Green* (2004) 33 Cal.4th 536, 570.)

A hearing was held on Clark's recusal motion in which he alleged that the Orange County District Attorney's Office had a conflict because Ardell Williams was to be a witness in the Comp USA case and the district attorney was therefore emotionally involved with Williams and unable to treat Clark in a fair and evenhanded manner based on the belief that he had arranged her murder to prevent her from testifying. (I MCRT 92-129.) The trial court, after considering all of the evidence presented at the hearing, found that there was no evidence "to show any unusually close relationship" between Williams and any deputy district attorney or attorneys to support the existence of a conflict, especially since the prosecutor who was originally trying the Comp USA case was not the same person who was now trying the consolidated Comp USA and Ardell Williams cases. (I MCRT 130-131; see *People v. Hamilton* (1988) 46 Cal.3d 123, 141 [recusal of entire district attorney's office "drastic step" where "[p]ublic confidence could be maintained with less extreme measures"].)

The trial court's denial of the recusal motion was a proper exercise of its discretion. There was no evidence to suggest that Ardell Williams had any

connection to anyone in the District Attorney's Office other than as a witness in the Comp USA case. Although Clark alleges that a number of decisions made by the District Attorney's Office relating to his prosecution, such as the decision to prosecute the Ardell Williams case in Orange County, suggest some sort of vindictiveness on that office's part towards him (AOB 45-46, 52-54), the trial court did not accept this interpretation of events as evidence of a conflict.

The evidence indicated that Clark had conspired with Antoinette Yancey to murder Ardell Williams, who was a witness in an Orange County murder prosecution. The vigorous prosecution of Clark for that crime, which was also an attempt to subvert the administration of justice in Orange County in the Comp USA case, was entirely consonant with the Orange County District Attorney's responsibility to do justice and his legal and ethical obligations to the people of the community he was elected to serve. As the trial court noted, any prosecutor would have acted accordingly. (I MCRT 130.) There was simply no evidence to suggest that a conflict existed or that the district attorney exercised its prosecutorial discretion in an improper manner and the trial court properly denied the recusal motion.

V.

ALLEGING BOTH MURDER IN THE COURSE OF ROBBERY AND MURDER IN THE COURSE OF BURGLARY SPECIAL CIRCUMSTANCES AS TO THE MURDER OF KATHY LEE BASED ON THE SAME COURSE OF CONDUCT OF BURGLARIZING AND ROBBING THE COMP USA STORE DID NOT VIOLATE THE EIGHTH AMENDMENT

Clark contends that it violated the Eighth Amendment to allege both murder in the course of robbery (Pen. Code, § 190.2, subd. (a)(17)(A)) and murder in the course of burglary (Pen. Code, § 190.2, subd. (a)(17)(G)) special circumstances as to the murder of Kathy Lee based on the same course of

conduct of burglarizing and robbing the Comp USA store. (AOB 56-59.) However, this Court rejected the identical argument in *People v. Melton* (1988) 44 Cal.3d 713, 765-769.

As this Court explained,

> it is constitutionally legitimate for the state to determine that a death-eligible murderer is more culpable, and thus more deserving of death, if he not only robbed the victim but committed an additional and separate felonious act, burglary, in order to facilitate the robbery and murder. Robbery involves an assaultive invasion of personal integrity; burglary a separate invasion of the sanctity of the home. Society may deem the violation of each of these distinct interests separately relevant to the seriousness of a capital crime.

(*Id.* at p. 767.)

Accordingly, Clark's claim should be rejected.

VI.

CLARK'S MOTION TO SUPPRESS EVIDENCE SEIZED IN HIS JAIL CELL WAS PROPERLY DENIED BECAUSE HE HAD NO EXPECTATION OF PRIVACY

Clark contends that a July 7, 1994, search of his cell in the Orange County Jail and seizure of two "kites"[11/] found there violated his Fourth Amendment rights. (AOB 60-73.) However, because Clark had no expectation of privacy in his jail cell, no Fourth Amendment violation occurred and the trial court properly denied his motion to suppress evidence.

In considering a trial court's denial of a motion to suppress evidence, a reviewing court views the record in the light most favorable to the trial court's ruling, deferring to those express or implied factual findings supported by substantial evidence, and then independently reviews the trial court's

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11. At the hearing on Clark's motion to suppress evidence, the corrections deputy who searched Clark's cell explained that "kite" is a term for an unauthorized communication between jail inmates, such as the two documents seized in Clark's cell. (5 RT 1432-1433.)

application of the law to the facts. (*People v. Davis* (2005) 36 Cal.4th 510, 528-529.) Under the California Constitution, challenges to police searches and seizures are reviewed under federal constitutional standards. (*People v. Woods* (1999) 21 Cal.4th 668, 674.)

This Court in *People v. Davis*, *supra*, 36 Cal.4th at 524-529, applied the United States Supreme Court's rulings in *Bell v. Wolfish* (1979) 441 U.S. 520 [99 S.Ct. 1861, 60 L.Ed.2d 447] and *Hudson v. Palmer* (1984) 468 U.S. 517 [104 S.Ct. 3194, 82 L.Ed.2d 393] and held that pretrial detainees have no expectation of privacy under the Fourth Amendment. Without an expectation of privacy, jail inmates' cells may be searched for any reason without implicating the Fourth Amendment. (See *People v. Davis*, *supra*, 36 Cal.4th at pp. 526-527.)

Clark moved to suppress the evidence seized from his jail cell, arguing that the search and seizure violated his Fourth Amendment rights. (2 CT 418-423.) After hearing the testimony of the corrections deputy who searched Clark's cell and seized the two kites, the trial court denied Clark's motion to suppress evidence, concluding that the deputy seized the kites pursuant to a jail policy prohibiting unauthorized communications between inmates and therefore did not violate Clark's Fourth Amendment rights. (5 RT 1409-1421, 1432-1468, 1480-1481.)

While the trial court was certainly correct in determining, based on the deputy's testimony, that seizure of the kites was appropriate under jail regulations, the deputy's purpose in doing so was legally irrelevant for purposes of the Fourth Amendment. Since Clark had no legally cognizable expectation of privacy in his cell, the search of the cell and seizure of the kites simply did not implicate his Fourth Amendment rights. (See *People v. Davis*, *supra*, 36 Cal.4th at pp. 526-527.) Therefore, Clark's motion to suppress evidence was properly denied.

VII.

THE PRETRIAL IDENTIFICATION PROCEDURE BY WHICH MATTHEW WEAVER IDENTIFIED CLARK WAS NOT UNDULY SUGGESTIVE AND HIS SUBSEQUENT IN-COURT IDENTIFICATION OF CLARK WAS PROPER UNDER THE TOTALITY OF THE CIRCUMSTANCES

Clark, who is African-American, contends that the photographic lineup shown to Matthew Weaver was unduly suggestive because Clark's photo was included in a six-pack with photos of five non-African-Americans and that Weaver's subsequent in-court identification of Clark was irreparably tainted. (AOB 74-87.) However, the pretrial identification procedure, which involved showing Weaver three six-packs containing photos of 12 other African-Americans, was not unduly suggestive and, regardless, Weaver's subsequent in-court identification of Clark was proper under the totality of the circumstances.

A criminal defendant has the burden of demonstrating that an identification procedure is unreliable. (*People v. Cunningham* (2001) 25 Cal.4th 926, 989; *People v. Ochoa* (1988) 19 Cal.4th 353, 412.) A trial court's ruling that a pretrial identification procedure is not unduly suggestive involves a mixed question of law and fact that is independently reviewed by an appellate court, although the trial court's determination of historical facts is afforded deference. (*People v. Kennedy* (2005) 36 Cal.4th 595, 608-609.)

In deciding whether admission of identification evidence violates a defendant's right to due process, a reviewing court determines:

> (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the

identification, and the lapse of time between the offense and the identification.

(*People v. Cunningham*, *supra*, 25 Cal.4th at p. 989.)

" 'If, and only if, the answer to the first question is yes and the answer to the second is not, is the identification constitutionally unreliable.' " (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 412.)

To determine whether a procedure is unduly suggestive, this Court determines whether anything caused the defendant to stand out from the others in a way to suggest the witness should select him. (*People v. Yeoman* (2003) 31 Cal.4th 93, 124.) A procedure which suggests in advance of identification by the witness the identity of the person suspected by the police is unfair. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 413.)

Clark moved to suppress the evidence of Matthew Weaver's pretrial identification of Clark, arguing that including his photo in a six-pack with photographs of five non-African-American men was unduly suggestive. (2 CT 425-434.) At the hearing on the motion, Investigator Frank Grasso testified at length about Weaver's identification of Clark in a photographic lineup on August 17, 1992. (13 RT 2616-2639.) After reviewing the transcript of the interview between Investigator Grasso and Weaver, Investigator Grasso's testimony, and the three six-packs of photographs shown to Weaver, the trial court concluded that the identification procedure was not unduly suggestive and denied the motion. (14 RT 2750-2754.)

In doing so, the trial court noted that, "on the surface . . . a six-pack with one Black man and five White men sounded outrageous." (14 RT 2751.) However, when all 18 of the photographs shown to Weaver are considered in their entirety, "that impression is destroyed." (14 RT 2751.) Of the 18 photographs shown to Weaver by Investigator Grasso, 12 were "obviously African-American in physical characteristics." (14 RT 2752.) Further, the

court noted Clark's "racial characteristics are not outstandingly apparent." (14 RT 2752.)

Nothing in this identification procedure unfairly suggested Clark was a suspect in the Comp USA robbery and murder. Weaver was shown three six-packs containing a total of 18 photographs. (13 RT 2630-2631, 2634-2635.) Investigator Grasso did nothing to draw particular attention to the six-pack containing Clark's photograph as opposed to the others. Investigator Grasso did not discuss Clark's race or racial characteristics with Weaver prior to showing him the photo lineup and read a standard admonishment to him. (13 RT 2629-2630.)

The particular composition of the six-pack containing Clark's photograph did not render this procedure unfair. "There is no requirement that a defendant in a lineup, either in person or by photo, be surrounded by others nearly identical in appearance." (*People v. Brandon* (1995) 32 Cal.App.4th 1033, 1052.) Indeed, simply because a suspect's photograph is much more distinguishable from the others in the lineup dose not render the lineup unconstitutional. (*Ibid.*) Although the trial court noted "slight shades of variation" in the background color of the photographs in the lineup (14 RT 2753), minor differences in image size or background color do not render a photographic lineup impermissibly suggestive. (*People v. Johnson* (1992) 3 Cal.4th 1183, 1217.)

However, even assuming that the trial court improperly concluded that the photographic lineup was not unduly suggestive, the in-court identification was nonetheless reliable under the totality of the circumstances. As this Court has observed, "there must be a 'substantial likelihood of irreparable misidentification' under the ' " 'totality of the circumstances' " ' to warrant reversal of a conviction on this ground." (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 990, citing *Manson v. Brathwaite* (1977) 432 U.S. 98, 104-107 [97 S.Ct. 2243, 53 L.Ed.2d 140].)

At the time of the Comp USA robbery and murder, Matthew Weaver had played on the same college basketball team with Clark's brother for approximately three months. (45 RT 8006.) After driving to Fountain Valley with Clark's brother in the U-Haul van, Weaver was introduced to Clark by name. (45 RT 8018-8029; 46 RT 8047.) After the introduction, Clark spoke directly to Weaver. (46 RT 8048.)

Weaver then got into the front passenger seat of Clark's BMW, with Clark seated next to him in the driver's seat, and drove toward the Comp USA store across the parking lot. (46 RT 8049-8055.) After finding Kathy Lee's body outside the Comp USA store and fleeing the scene with Clark, Weaver spent another five to fifteen minutes in the car with Clark before finally being dropped off at the car dealership. (46 RT 8055-8062.)

As the facts indicate, Weaver had a meaningful opportunity to closely observe Clark both outside the Del Taco restaurant and in the BMW and even interacted with him throughout the episode. Although some time lapsed between the Comp USA robbery and murder on October 18, 1991, and Weaver coming forward and ultimately identifying Clark in the photo lineup on August 17, 1992, Weaver never indicated any difficulty in remembering the events surrounding the Comp USA robbery and murder despite the lapse of time. Finally, Weaver was admonished before being shown the three photo six-packs and merely asked if he recognized anyone. (13 RT 2630, 2745-2746.) There is simply no likelihood that, under the totality of the circumstances, Weaver misidentified Clark as the person he was introduced to as Eric Clark's brother at the Del Taco restaurant and the driver of the BMW at the Comp USA store and Weaver's identification of Clark was properly admitted. (See *People v. Cunningham*, *supra*, 25 Cal.4th at p. 990.)

VIII.

THE TRIAL COURT PROPERLY DENIED CLARK'S SEVERANCE MOTION BECAUSE THE STATUTORY REQUIREMENTS FOR JOINDER WERE SATISFIED AND CLARK FAILED TO MEET HIS BURDEN OF ESTABLISHING PREJUDICE RESULTING FROM THE JOINDER OF THE CHARGES

Clark contends that the trial court improperly denied his motion to sever the counts relating to the Comp USA robbery and murder from the counts involving the Ardell Williams murder. (AOB 88-102.) However, the trial court properly denied Clark's motion because the statutory requirements for joinder were satisfied and Clark failed to meet his burden of establishing prejudice resulting from the joinder of the charges.

"The law prefers consolidation of charges." (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 423.) "Joinder and severance of different criminal charges against the same defendant are governed by [Penal Code] section 954." (*People v. Maury* (2003) 30 Cal.4th 342, 391.)[12/] Joinder is proper under section 954 where the offenses are of the same class or connected together in their commission. (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 423; *People v. Johnson* (1988) 47 Cal.3d 576, 587.) This determination is reviewed

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12. Penal Code section 954 provides, in pertinent part:

> An accusatory pleading may charge two or more different offenses connected together in their commission . . . or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated . . . provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately.

independently as a "pure question of law." (*People v. Alvarez* (1996) 14 Cal.4th 155, 188.)

When the statutory requirements for joinder are met, a defendant can predicate error only upon a clear showing of potential prejudice. (*Ibid.*) " ' "The determination of prejudice is necessarily dependent upon the particular circumstances in each individual case." ' " (*People v. Bradford* (1997) 15 Cal.4th 1229, 1315.)

A trial court's decision as to whether separate trials are required in the interests of justice is reviewed for an abuse of discretion. (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 188.) The trial court's discretion in refusing severance is broader than its discretion in admitting evidence of uncharged offenses. In weighing probative value against prejudicial effect, the beneficial results from a joint trial are considered when assessing probative-value, which requires a defendant to make an even greater showing of prejudice than would be required in determining whether to admit other-crimes evidence in a severed trial. (*People v. Balderas* (1985) 41 Cal.3d 155, 173; see also *People v. Cummings* (1993) 4 Cal.4th 1233, 1284 ["The state's interest in joinder gives the court broader discretion in ruling on a motion for severance than it has in ruling on admissibility of evidence."].) An abuse of discretion may only be found when the trial court's ruling falls outside the bounds of reason. (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 423.)

This Court has developed criteria to guide evaluations of trial court decisions.

> " ' "Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a 'weak' case has been joined with a 'strong' case, or with another 'weak' case, so that the 'spillover' effect of aggregate evidence on several charges might well alter the outcome

> of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case." ""

(*People v. Ochoa*, *supra*, 26 Cal.4th at p. 423.) However, the criteria "are not equally significant." (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1315.)

After considering Clark's motion to sever the Comp USA counts from the Ardell Williams counts and the prosecution's opposition, which were submitted without argument from either party, the trial court denied the motion. (2 CT 436-446; 6 CT 2316-2324; 14 RT 2911-2913.) This was a proper exercise of the trial court's discretion.

All seven counts arising from the Comp USA robbery and murder and the Ardell Williams murder were properly joined under Penal Code section 954 because all seven charges were connected in their commission and involved the same class of offenses. (See *People v. Jenkins*, *supra*, 22 Cal.4th at p. 947 [murder and conspiracy to commit murder belong to same class of crimes]; *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1243 [murder and robbery]; *People v. Johnson*, *supra*, 47 Cal.3d at p. 587 [murder, robbery, and burglary].) Thus, joinder was proper unless Clark carried his burden to make a clear showing of potential prejudice, which he failed to do. (See *People v. Bradford*, *supra*, 15 Cal.4th at p. 1315.)

The first step in assessing a defendant's claim of prejudicial joinder is to determine cross-admissibility because if evidence of the joined offenses would be cross-admissible in separate trials, "any inference of prejudice is dispelled." (*People v. Bradford*, *supra*, at pp. 1315-1316; see also *People v. Kraft* (2000) 23 Cal.4th 978, 1030.) However, although cross-admissibility suffices to negate prejudice, the absence of cross-admissibility is not sufficient to demonstrate prejudice. (Evid. Code, § 954.1; *People v. Stitely* (2005) 35 Cal.4th 514, 532-533.)

Evidence relating to the Comp USA robbery and murder was cross-admissible as to Ardell Williams's murder and vice versa. Pursuant to

Evidence Code section 1101, subdivision (b), evidence of a prior crime is admissible "when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity. . .) other than his or her disposition to commit such an act."

Here, Ardell Williams's grand jury testimony directly implicated Clark as the mastermind of the Comp USA robbery and murder. (50 RT 8731-8793.) It was the potential impact of Ardell Williams testifying at Clark's trial that established Clark's motive to murder Williams to prevent her from testifying. Evidence relating to the Comp USA robbery and murder was therefore both cross-admissible and essential to establish Clark's motive to murder Williams under Evidence Code section 1101, subdivision (b). (See *People v. Stitely*, *supra*, 35 Cal.4th at p. 532 [evidence that defendant killed a rape victim to prevent her from reporting crime as another rape victim had done cross-admissible to show motive].) Because the evidence of the Comp USA crimes and the Ardell Williams murder was cross-admissible, no prejudice may be inferred. (See *People v. Bradford*, *supra*, 15 Cal.4th at pp. 1315-1316.)

Despite the ample showing of cross-admissibility, it is also the case that because the charges were properly joined under the statute, even had there been no cross-admissibility, consolidation was proper because Clark failed to establish prejudice. (*People v. Bradford*, *supra*, 15 Cal.4th at p. 1317.)

Both the Comp USA crimes and the Ardell Williams murder were "strong" cases and neither was unusually likely to inflame the passions of the jury against Clark. Both Kathy Lee and Ardell Williams suffered single gunshot wounds to the head and neither murder was substantially more grizzly or brutal than the other. (47 RT 8412-8420; 53 RT 9314-9321; 54 RT 9449-9470.) Although Clark's murder of Ardell Williams to prevent her from testifying in the Comp USA case was certainly insidious, it was no more inflammatory than the senseless and essentially random killing of Kathy Lee outside the Comp USA store while her teenage son was inside. In both

circumstances, ample evidence established that Clark planned and set into motion the events that resulted in both murders. Neither murder was more inflammatory than the other so as to create prejudice through their joinder. (See *People v. Ochoa*, *supra*, 26 Cal.4th at p. 424; *People v. Musslewhite*, *supra*, 17 Cal.4th at pp. 1244-1245.)

Further, both the Comp USA crimes and the Ardell Williams murder involved capital crimes in their own right and joinder did not affect the charging of the multiple special circumstances. (7 CT 2470; see *People v. Sandoval* (1992) 4 Cal.4th 155, 173.) Similarly, Clark's vague contention that joinder prevented him from testifying in his own defense as to one crime while remaining silent as to the other is unavailing. As this Court has noted,

> The need for severance does not arise . . . " ' until the defendant makes a convincing showing that he has both important testimony to give concerning one count and strong need to refrain from testifying on the other.' " [Citations.]

(*Id.* at p. 174.) Clark made no such showing in the trial court and has similarly failed to do so here. (2 CT 436-446; AOB 100-102.)

Accordingly, Clark's claim that joinder of the Comp USA crimes with the Ardell Williams murder was improper must fail.

IX.

CLARK EXPRESSLY ABANDONED HIS MOTION TO DISCOVER THE PROSECUTION'S STANDARDS FOR CHARGING SPECIAL CIRCUMSTANCES AND, REGARDLESS, HIS DISCOVERY MOTION WAS WITHOUT MERIT

Clark contends that it was improper for the prosecution not to provide discovery regarding the Orange County District Attorney's Office's standards and practices in charging special circumstances in cases since November 7, 1978, in order for him to investigate the possibility of "purposeful, invidious prosecutorial discrimination." (AOB 103-112.) Clark fails to acknowledge that

his counsel expressly abandoned the discovery request upon the severance of Clark's trial from that of co-defendant Yancey and, regardless, Clark made no facial showing of discrimination in the prosecution's charging decisions to justify his wide-ranging and onerous discovery motion.

First, Clark's counsel expressly abandoned the discovery request upon the severance of Clark's trial from that of co-defendant Yancey. As discussed in Argument I, *ante*, a criminal defendant's counsel "has general authority to control the procedural aspects of the litigation and, indeed, to bind the client in these matters." (*In re Horton*, *supra*, 54 Cal.3d at p. 94.) At a November 6, 1995, hearing on Clark's discovery request, the trial court asked Clark's counsel, "[I]f these defendants are severed, for example, then would you even be asking for this discovery?" Clark's counsel responded, "No. (2 RT 896.) At a November 29, 1995, hearing, after the trial court granted a motion to sever Clark's trial from that of co-defendant Yancey, the court again asked Clark's counsel about his request to "discover the prosecution's standards for charging special circumstances." Clark's counsel replied,

> Since there is now a severance, the purpose of that motion is no longer present because you're not going to have two defendants facing the same jury with comparison between the two. So we will not be asking for, they do not have to supply or we would not be requesting discovery of all of their other cases or litigating that motion.

(8 RT 1868.) Accordingly, Clark's counsel expressly abandoned his discovery motion, relieving the trial court of any obligation to rule on its merits.

Even if Clark had not abandoned the motion, it would not have entitled him to discovery because it was without merit. As the prosecutor noted in his opposition, Clark's discovery requests amounted to an incredibly onerous and burdensome fishing expedition for evidence of discrimination, absent any facial showing that such discrimination was present in the prosecutor's charging

decision. (6 CT 2104-2118.) As this Court explained in upholding a trial court's denial of a similar discovery motion,

> Although a defendant seeking discovery is "not required to meet the standard of proof requisite to the dismissal of a discriminatory prosecution" [citation], discovery is not a fishing expedition. A motion for discovery must "'describe the requested information with at least some degree of specificity and . . . be sustained by plausible justification.' " [Citation].

(*People v. McPeters* (1992) 2 Cal.4th 1148, 1171.)

In his first discovery request, Clark sought:

> 1. The case name and number of each case prosecuted by the Office of the District Attorney in which special circumstances were alleged pursuant to Penal Code section 190.2 as amended November 7, 1978.
>
> 2. The case name and number of each case prosecuted by the Office of the District Attorney in which the defendant was charged with homicide and the underlying facts of the homicide established probable cause to believe that one or more of the special circumstances enumerated in Penal Code section 190.2 was applicable, but no such special circumstances were charged.
>
> 3. The policy and procedures in the Office of the District Attorney since November 7, 1978, to the present with respect to the charging of special circumstances within Penal Code section 190.2.
>
> The race and ethnic background of each victim and defendant mentioned in 1 and 2, above.

(2 CT 559-561.)

Later, in a supplemental discovery motion, Clark expanded his search to include:

> 1) The names of all cases which proceeded to trial and penalty as capital cases since 1978.
>
> 2) The charging documents including all the special circumstance allegations.
>
> 3) The prosecutor's statement in aggravation.

4) Any and all prior convictions suffered by the capital defendants which were introduced as evidence during the guilt and penalty phase.

(5 CT 1643-1646.)

To justify his discovery request, Clark offered the declaration of his trial counsel, who indicated that he was "informed and believe[d]" that race was a factor in the decision to charge special circumstances and that other participants in the Comp USA crimes, three of whom were Black and one White, while equally culpable, were not subjected to the death penalty. (2 CT 562-563.)

As in *McPeters*, Clark here "showed no more than the barest form of 'apparent disparity,' "and this was insufficient to justify his wide-ranging discovery request. (See *People v. McPeters*, *supra*, 2 Cal.4th at p. 1171.) Further, the majority of the information he sought, such as previously tried cases and documents filed in court, was in the public domain and could just as easily have been obtained by the defense. Internal information available only to the District Attorney's Office was provided by the prosecutor, who was also the chairman of the special circumstances committee in the Orange County District Attorney's Office, and who voluntarily explained the internal protocol followed by the District Attorney's Office in charging special circumstances at the hearing on the discovery motion, as well as offering some statistical information regarding death penalty prosecutions in Orange County. (2 RT 898-904.) The prosecutor, in the spirit of cooperation, provided Clark with far more information than he was legally entitled to, based on the utterly deficient showing of any discrimination on the part of the prosecution and Clark's motion was without merit. (See *Ibid.*)

X.

JEANETTE MOORE'S TESTIMONY REGARDING HER RECEIPT OF A THREATENING LETTER AND NEWSPAPER CLIPPING IN COUNTY JAIL WAS PROPERLY ADMITTED AT THE PRELIMINARY HEARING BECAUSE HER STATE OF MIND WAS RELEVANT TO THE ISSUE OF HER CREDIBILITY

Clark contends that the trial court improperly admitted evidence at the preliminary hearing regarding Jeanette Moore's receipt in jail of a threatening letter and newspaper clipping because Moore's state of mind was irrelevant. (AOB 113-116.) While Clark failed to press for a ruling on his objection at the preliminary hearing and therefore forfeited the claim on appeal, the evidence was nonetheless properly admitted because Moore's state of mind was relevant to the issue of her credibility.

Preliminarily, although Clark made a relevance objection to Moore's preliminary hearing testimony regarding the threatening letter and newspaper clipping she received in county jail, the trial court, at Clark's request, took the matter under submission and never made a ruling on the objection. (I MCRT 213-214.) Clark's failure to press for a ruling on the objection forfeits the claim on appeal. (See *People v. Morris* (1991) 53 Cal.3d 152, 190, overruled on other grounds, *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

Nonetheless, Moore's testimony about the threatening letter and newspaper clipping was properly admitted. Under the Evidence Code, only relevant evidence is admissible. (Evid. Code, § 350; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 995.) Relevant evidence is defined as,

> evidence, including evidence relevant to the credibility of a witness. . ., having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

(Evid. Code, § 210; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 995.)

A trial court has broad discretion to determine the relevance of evidence and its exercise of discretion "is not grounds for reversal unless ' "the court

exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." ' [Citations.]" (*People v. Ochoa*, *supra*, 26 Cal.4th at pp. 437-438; see also *People v. Cunningham*, *supra*, 25 Cal.4th at p. 995.)

At the conclusion of her direct examination at the preliminary hearing, the prosecutor asked Jeanette Moore about "a very uncomfortable letter" she received while in the Orange County Jail. The prosecutor explained that the evidence was being offered to establish the "state of mind of the witness at this time." Clark objected to this evidence on grounds of "either foundation or relevance." (I MCRT 213.) Moore then proceeded to identify the letter (People's Preliminary Hearing Exh. 8) as the one she received at the jail without further objection. (I MCRT 214.)

Contrary to Clark's assertion, Moore's state of mind was relevant to establish her credibility. Credibility of a witness is expressly included in the statutory definition of relevant evidence. (Evid. Code, § 210.) Evidence Code section 785 provides that a witness's credibility may be "supported by any party, including the party calling [her]."

By establishing that Moore was afraid of Clark and of testifying against him (I MCRT 213), the prosecution sought to demonstrate that Moore was credible and had no reason to fabricate her testimony. The fact that Moore had been threatened also made the substance of her testimony more credible. As this Court has held, evidence that a witness is afraid to testify or fears retaliation for testifying is relevant to credibility and admissible. The basis for the fear is likewise relevant to credibility and a trial court is within its discretion in admitting such evidence. (*People v. Gray* (2005) 37 Cal.4th 168, 220.) Therefore, Moore's state of mind was directly relevant and the trial court properly admitted her testimony at the preliminary hearing. (See *People v. Cunningham*, *supra*, 25 Cal.4th at p. 1022 [testimony of witness that he did not

wish to be housed near defendant for fear of retaliation relevant to "demonstrate that the witness was credible and would not be motivated to lie"].

Nonetheless, even assuming Moore's testimony regarding the threat was irrelevant, Clark's claim fails for want of a showing of prejudice. As discussed in Argument II, *ante*, irregularities at the preliminary hearing require reversal only if the defendant "can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination." (*People v. Pompa-Ortiz*, *supra*, 27 Cal.3d at p. 529.) Error in the "application of ordinary rules of evidence" is reviewed under the harmless error standard articulated in *People v. Watson*, *supra*, 46 Cal.2d at 836, and will only result in reversal where it is reasonably probable that the defendant would have received a more favorable outcome had the challenged evidence not been admitted. (*People v. Harris* (2005) 37 Cal.4th 310, 336.)

Here, Moore's testimony regarding the letter and newspaper clipping she received in jail was certainly not an integral part of the case against Clark. As discussed in Argument II, *ante*, the prosecution presented ample evidence during the lengthy preliminary hearing to establish probable cause that Clark committed the charged offenses, irrespective of Moore's testimony about the letter. Clark was later tried by a jury and found guilty of the charges by the higher standard of proof beyond a reasonable doubt. Accordingly, it is not reasonably probable that Clark would have obtained a more favorable result had evidence of the letter and newspaper clipping not been admitted and any error was harmless. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

XI.

ERIC CLARK'S STATEMENT TO MATTHEW WEAVER THAT HE WOULD BE PAID $100 TO HELP MOVE COMPUTERS FROM CLARK'S COMPUTER STORE WAS PROPERLY ADMITTED AT THE PRELIMINARY HEARING AS NON-HEARSAY AND, IN ANY EVENT, THE ADMISSION OF A CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE WAS SATISFIED

Clark contends that the trial court improperly admitted evidence at the preliminary hearing regarding Eric Clark's statements to Matthew Weaver that Clark owned a computer store and Weaver would be paid $100 to help move computers from the store. (AOB 117-124.) While Clark failed to press for a ruling on his objection at the preliminary hearing and therefore forfeited the claim on appeal, the evidence was nonetheless properly admitted for the non-hearsay purpose of establishing the existence of a conspiracy and as a statement of a conspirator.

First, although Clark made a hearsay objection to Eric Clark's statements to Weaver about paying him $100 to help move computers at his brother's store, the trial court merely took the matter under submission and never made a ruling on the objection. (II MCRT 496.) Clark's failure to press for a ruling on the objection forfeits the claim on appeal. (See *People v. Morris*, *supra*, 53 Cal.3d at p. 190, overruled on other grounds, *People v. Stansbury*, *supra*, 9 Cal.4th at p. 830, fn. 1.)

Even assuming the issue was properly preserved for appeal, Eric Clark's statement to Weaver requesting his help moving computers at his brother's store for $100 was properly admitted. Evidence Code section 1200, subdivision (a) defines hearsay as an out-of-court statement offered to prove the truth of the matter asserted. (*People v. Crew* (2003) 31 Cal.4th 822, 841.) Hearsay statements are inadmissible unless an exception to the hearsay rule applies. (Evid. Code, § 1200, subd. (b); *People v. Hardy* (1992) 2 Cal.4th 86, 139.)

While the prosecution argued that Eric Clark's statement was being offered under Evidence Code section 1223 as a statement of a conspirator (II MCRT 496), the statement was admissible for the non-hearsay purpose of demonstrating the existence of a conspiracy between Clark, his brother Eric and others to rob the Comp USA store. (See *People v. Noguera* (1992) 4 Cal.4th 599, 624-625.) The truth of Eric Clark's statement, i.e. that Weaver would be paid $100 to help move computers from Clark's computer store, was of no importance to the prosecution's case. Indeed, the statement was patently untrue. The computer store and the computers in it did not belong to Clark and Weaver was never paid $100. The importance of the statement was not its truth, but instead, the fact that it was made at all. It demonstrated Eric Clark's role in helping Clark engineer the robbery of the Comp USA, by securing Weaver's assistance to remove the proceeds of the robbery from the scene. It also demonstrated Clark's efforts to conceal the group's true purpose in robbing the Comp USA store from Weaver, which would both prevent him from going to the authorities and from sharing in the proceeds of the crime.

Yet, even assuming that Eric Clark's statement to Weaver was offered for its truth, it was admissible under Evidence Code section 1223 as an exception to the hearsay rule. A trial court's admission of evidence under a hearsay exception is reviewed for an abuse of discretion. (*People v. Martinez* (2000) 22 Cal.4th 106, 120.) A trial court similarly has broad discretion in determining whether the proponent of evidence has established the necessary foundational requirements for the application of a hearsay exception. (*Ibid.*) The trial court's ruling on admissibility "implies whatever finding of fact is prerequisite thereto; a separate or formal finding is, with exceptions not applicable here, unnecessary. [Citation.]" [Citation.] (*Ibid.*)

Under Evidence Code section 1223, hearsay statements are admissible if the proponent of the evidence "presents 'independent evidence to establish

prima facie the existence of . . . [a] conspiracy.'" (*People v. Hardy*, *supra*, 2 Cal.4th at p. 139.)

> Once independent proof of a conspiracy has been shown, three preliminary facts must be established: "(1) that the declarant was participating in a conspiracy at the time of the declaration; (2) that the declaration was in furtherance of the objective of that conspiracy; and (3) that at the time of the declaration the party against whom the evidence is offered was participating or would later participate in the conspiracy."

(*Ibid.*)

The prosecution had already amply demonstrated the existence of a conspiracy to rob the Comp USA store at the preliminary hearing prior to Weaver's testimony regarding the statement made by Eric Clark about moving computers and Eric Clark's involvement in that conspiracy. Jeanette Moore had already testified about Clark helping her to obtain a fraudulent driver's license and using that driver's license to rent the U-Haul truck used in the robbery. (I MCRT 185-196, 205.) She identified Eric Clark as the person who drove her to the U-Haul rental facility on October 3, 1991, provided her with the false driver's license Clark had helped her obtain and a phone number to use on the rental application, gave her the money to pay for the rental, and drove the truck away. (I MCRT 196-203.) Moore then returned the false driver's license to Eric Clark when the transaction was completed. (I MCRT 204-205.)

Officer Rakitis then testified about hearing the gunshot at the Comp USA store, seeing Clark's BMW drive away from the scene, finding Kathy Lee's body and arresting Ervin with a .38 handgun in his pocket, and finding the Comp USA employees handcuffed in the men's room. (III MCRT 435-454.)

Based on this evidence, which had already been presented at the preliminary hearing prior to Weaver's testimony, the trial court could properly conclude that the prosecution had met its burden of establishing prima facie evidence that a conspiracy to rob the Comp USA existed, that both Clark and

his brother were involved in the conspiracy, and that Eric Clark was acting in furtherance of the conspiracy when he asked Weaver to help move computers from Clark's computer store. Accordingly, Eric Clark's statement was also admissible for its truth under Evidence Code section 1223. (See *Ibid.*)

Nonetheless, even assuming Eric Clark's statement to Weaver about moving computers from Clark's store was improperly admitted, Clark's claim fails for want of a showing of prejudice. As discussed in Argument II, *ante*, irregularities at the preliminary require reversal only if the defendant "can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination." (*People v. Pompa-Ortiz*, *supra*, 27 Cal.3d at p. 529.) Error in the "application of ordinary rules of evidence" is reviewed under the harmless error standard articulated in *People v. Watson*, *supra*, 46 Cal.2d at 836, and will only result in reversal where it is reasonably probable that the defendant would have received a more favorable outcome had the challenged evidence not been admitted. (*People v. Harris*, *supra*, 37 Cal.4th at p. 336.)

As discussed above, Eric Clark's statement to Weaver was really not important for its truth, i.e. that Clark owned the computer store and would pay $100 for help moving computers, but rather as evidence of a conspiracy to rob the Comp USA. As discussed in Argument II, *ante*, the prosecution presented ample evidence during the lengthy preliminary hearing to establish probable cause that Clark committed the charged offenses. Clark was later tried by a jury and found guilty of the charges by the higher standard of proof beyond a reasonable doubt. Accordingly, it is not reasonably probable that Clark would have obtained a more favorable result had Eric Clark's statement to Weaver not been admitted and any error was harmless. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

XII.

THE TRIAL COURT'S EXCLUSION OF EVIDENCE AT THE PRELIMINARY HEARING OF LIZ FONTENOT'S KNOWLEDGE REGARDING ARDELL WILLIAMS'S PRIOR CONVICTIONS DID NOT VIOLATE THE CONFRONTATION CLAUSE

Clark contends that his rights under the Confrontation Clause were violated when the trial court at the preliminary hearing sustained the prosecution's relevance and Evidence Code section 352 objections to Clark's questioning of Ardell Williams's sister, Liz Fontenot, regarding her knowledge of Williams's involvement in previous computer store thefts. (AOB 125-133.) While Clark failed to challenge the ruling on Confrontation Clause grounds at the preliminary hearing and therefore forfeited the claim on appeal, the trial court's exclusion of evidence of Liz Fontenot's knowledge of her sister's involvement in prior computer store thefts was proper.

Clark has forfeited his claim on appeal by failing to challenge the trial court's ruling on Confrontation Clause grounds at the preliminary hearing. Failure to assert the Confrontation Clause as grounds for challenging an evidentiary ruling in the trial court waives the issue on appeal. (*People v. Burgener* (2003) 29 Cal.4th 833, 869.) Here, although Clark made an offer of proof as to the relevance of the proffered testimony of Liz Fontenot, he never mentioned the Confrontation Clause in challenging the trial court's ruling. Accordingly, his claim is forfeited.

In any event, the trial court properly excluded the evidence and did not violate Clark's right of confrontation. The Confrontation Clause permits a criminal defendant to engage in,

> appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, 'to expose to the jury the

> facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'

(*People v. Frye* (1998) 18 Cal.4th 894, 946, quoting *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680 [106 S.Ct. 1431, 89 L.Ed.2d 674].)

However, trial courts nonetheless have "wide latitude in restricting cross-examination that is repetitive, prejudicial, confusing of the issues, or of marginal relevance" without implicating a defendant's confrontation rights. (*People v. Frye*, *supra*, 18 Cal.4th at p. 946.) In order to establish a Confrontation Clause violation, a defendant must "show that the prohibited cross-examination would have produced 'a significantly different impression of [the witnesses'] credibility.'" (*Ibid.*) This, Clark cannot do.

During his preliminary hearing cross-examination of Liz Fontenot, Clark's counsel asked her, "You didn't know your sister had been convicted of crimes, from stealing from computer stores?" The prosecutor objected on grounds of relevance and the trial court sustained the objection. (V MCRT 1035-1036.)

Clark then made an offer of proof that Fontenot's knowledge of her sister's prior convictions was relevant to her credibility because she would not be "so nonchalant" regarding Williams's involvement in the Comp USA crimes, as he believed she appeared in her tape recorded conversations with Clark, if she knew of Williams's history of similar criminal activity. (V MCRT 1036-1038.)

The prosecution responded that Fontentot's knowledge of Williams's prior convictions was a collateral matter and should be excluded on relevance and Evidence Code section 352 grounds. (V MCRT 1038-1039.) The trial court sustained the objection. (V MCRT 1039.)

While Clark contends the prosecution introduced Fontenot's testimony for the purpose of "shor[ing] up the credibility of Ardell Williams," and that therefore the evidence of Fontenot's knowledge of Williams's prior convictions

was relevant to attack her testimony as to Williams's good character (AOB 128), this contention is not borne out by the record. The prosecution introduced Fontenot's testimony for the purpose of laying a foundation for the tape recorded conversation between Clark and Fontenot in which Clark expressed his suspicions regarding Williams's cooperation with the police. (IV MCRT 908-917; V MCRT 942-956.) The prosecution never elicited any testimony from Fontenot at the preliminary hearing regarding Williams's character.

Clark, on cross-examination, did ask Fontenot if she was alarmed that Williams may "have gotten into some deep stuff or in over her head," to which she replied that, "I never thought that she could be involved in anything." (V MCRT 1034.) Fontenot then clarified that she did not "think she would be involved with anyone getting shot or anything close to it." (V MCRT 1035.) Fontenot's knowledge regarding Williams's prior theft convictions would have had no bearing on her credibility in asserting her opinion that Williams would not have been involved in a shooting incident, as Williams had no history of violent criminal conduct of the sort involved here, and the testimony Clark sought to elicit was therefore irrelevant. Accordingly, as the challenged testimony would not have produced a significantly different impression of either Fontenot's or Williams's credibility, the trial court's application of state law evidentiary rules to exclude this testimony did not implicate the Confrontation Clause. (See *People v. Frye*, *supra*, 18 Cal.4th at p. 946.)

Nonetheless, even assuming the trial court should have permitted Clark to question Fontenot regarding her knowledge of Williams's prior convictions, Clark's claim fails for want of a showing of prejudice. As discussed in Argument II, *ante*, irregularities at the preliminary hearing require reversal only if the defendant "can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination." (*People v. Pompa-Ortiz*, *supra*, 27 Cal.3d at p. 529.) "[T]he constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like

other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis" and will only result in reversal where the error is not harmless beyond a reasonable doubt. (*Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 684.) In considering the prejudice of such a violation, a reviewing court should consider several factors, including,

> the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

(*Ibid.*)

These factors all support the conclusion that any error in not permitting Clark to question Fontenot regarding her knowledge of Williams's prior convictions was harmless beyond a reasonable doubt. As discussed above, the prosecution merely used Fontenot's testimony to establish the foundation for Clark's tape recorded statements. The court at the preliminary hearing listened to the tape of those statements. (IV MCRT 916-917.) Accordingly, Fontenot's personal knowledge of Ardell Williams's prior convictions, which were later explored in their own right at trial in great detail (50 RT 8782-8783; 51 RT 8963-8966; 60 RT 10156), was of little independent relevance. Further, Clark had considerable opportunity to cross-examine Fontenot at great length, both at the preliminary hearing (V MCRT 986-1011, 1017-1036, 1047-1059, 1065-1075, 1081-1092, 1115-1122), and at trial (53 RT 9265-9276; 9285-9290). Finally, as discussed in Argument II, *ante*, the prosecution presented ample evidence during the lengthy preliminary hearing to establish probable cause that Clark committed the charged offenses. Clark was later tried by a jury and found guilty of the charges by the higher standard of proof beyond a reasonable doubt. Accordingly, any error was harmless beyond a reasonable doubt. (See *Delaware v. Van Arsdall*, *supra*, 475 U.S. at p. 684.)

XIII.

THE TRIAL COURT PROPERLY FOUND PROSECUTION WITNESS ALONZO GARRETT IN CONTEMPT FOR REFUSING TO TAKE THE OATH AT THE PRELIMINARY HEARING BECAUSE HE HAD NOT VALIDLY INVOKED THE PRIVILEGE AGAINST SELF-INCRIMINATION AND HIS SUBSEQUENT TRIAL TESTIMONY WAS NOT COERCED

Clark contends that prosecution witness Alonzo Garrett had a valid claim of the privilege against self-incrimination that justified his refusal to testify at the preliminary hearing and that the trial court's failure to recognize his claim of privilege, and the power of the prosecution to seek immunity in order to secure his testimony rendered his subsequent trial testimony, made after being found in contempt for his failure to take the oath at the preliminary hearing, unlawfully coerced. (AOB 134-144.) Clark's claim fails because Garrett did not invoke the privilege against self-incrimination at the preliminary hearing and there was no lawful basis for him to refuse to take the oath.

"It is a bedrock principle of American (and California) law, embedded in various state and federal constitutional and statutory provisions, that witnesses may not be compelled to incriminate themselves." (*People v. Seijas* (2005) 36 Cal.4th 291, 304; Evid. Code, § 940.) The privilege against compulsory self-incrimination "'must be accorded liberal construction in favor of the right it was intended to secure'" and may be asserted by a witness who has "'reasonable cause to apprehend danger from a direct answer.'" (*Ibid.*, quoting *Hoffman v. United States* (1951) 341 U.S. 479, 486 [71 S.Ct. 814, 95 L.Ed. 1118].)

A witness's assertion that answering a question put to him would result in self-incrimination is insufficient. (*People v. Seijas*, *supra*, 36 Cal.4th at p. 304.) When a witness claims the privilege, it is the witness's burden to show "that the proffered evidence might tend to incriminate him." (Evid. Code, §

404; *People v. Seijas*, *supra*, 36 Cal.4th at p. 305.) A court may deny the assertion of the privilege where it is " ' " '*perfectly clear*, from a careful consideration of all the circumstances in the case, that the witness is mistaken, and that the answer[s] *cannot possibly* have such tendency' to incriminate." ' " (*Id.* at pp. 304-305, quoting *Malloy v. Hogan* (1964) 378 U.S. 1, 12 [84 S.Ct. 1489, 12 L.Ed.2d 653] (original italics).)

In reviewing a trial court's determination as to the availability of the privilege, an appellate court defers to the trial court's factual findings, but independently reviews the trial court's legal conclusions.[13] (*People v. Seijas*, *supra*, 36 Cal.4th at p. 304.)

Clark's claim that Alonzo Garrett had a Fifth Amendment privilege not to testify at the preliminary hearing fails at the outset because Garrett never asserted any Fifth Amendment privilege. The privilege against self-incrimination is personal and may only be asserted by the holder of the privilege. (*People v. Ford* (1988) 45 Cal.3d 431, 439, citing *Rogers v. United States* (1951) 340 U.S. 367, 370-371 [71 S.Ct. 438, 95 L.Ed. 344].) As the United States Supreme Court noted in *Rogers*, if a witness desires the protection of the privilege against self-incrimination, he is required to invoke it. (*Ibid.*)

At the preliminary hearing, the prosecution called as a witness Alonzo Garrett, who was already serving a term in state prison for an unrelated offense and whom Clark had shown transcripts of Williams's grand jury testimony to while incarcerated together in the Orange County Jail. (V MCRT 967-968.) Garrett's counsel indicated to the court that he believed Garrett had a Fifth Amendment privilege not to testify because his call to Ardell Williams, who

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13. This Court in *Seijas* left open the question of whether the independent review standard, or the more deferential abuse of discretion standard, would be applicable where, as here, the witness was not a defense witness and the defendant's confrontation rights were not implicated. (*People v. Seijas*, *supra*, 36 Cal.4th at p. 304.) However, as will be demonstrated, the trial court's determination in this case was proper under either standard.

was a personal friend, from jail could be interpreted as an attempt to dissuade a witness.[14] However, Garrett's counsel noted that, "I don't know if we'll ever get there because it's Mr. Garrett's desire -- he doesn't even want to be in the courtroom. And if brought into the courtroom, he asked me to inform the court that he's not going to say a word." (V MCRT 966, 969-970.)

The court then asked if Garrett would assert a Fifth Amendment privilege, to which his counsel responded, "He told me he is not going to say a word. I'm asserting his Fifth Amendment on his behalf. And he told me he's not going to say a word." (V MCRT 970-971.)

Garrett was then brought before the court, where he refused to speak. After twice instructing Garrett, in the face of his continued silence, to take the oath, the trial court informed him that he could be found in contempt pursuant to Penal Code section 166, subdivision (a)(6).[15] (V MCRT 975-976.) When Garrett continued to refuse to take the oath, the trial court found that he had unlawfully refused to be sworn as a witness and found him in contempt. (V MCRT 978.)

Garrett's stubborn silence and refusal even to be sworn as a witness or in any way to participate in the proceedings cannot be considered an invocation of his privilege against self-incrimination and therefore any claim of privilege was waived. (See *Rogers v. United States*, *supra*, 340 U.S. at pp. 370-371.)

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14. At trial, Garrett testified that he called Williams from jail and asked her about her involvement in the case. When Williams told him that she was a "key witness in the case," Garrett responded that "it's not cool to be snitching on people, because anybody out there can get wind of it." He then asked if she had talked to the police about obtaining protection. (56 RT 9788-9793.) Consequently, had Garrett made an effective invocation of the privilege, such a claim would have failed because his testimony was in no way incriminating. (See *People v. Seijas*, *supra*, 36 Cal.4th at pp. 304-305.)

15. Penal Code section 166, subdivision (a)(6) provides that "[t]he contumacious and unlawful refusal of any person to be sworn as a witness" is a misdemeanor.

Nonetheless, even assuming his attorney could invoke the privilege for him, he utterly failed to even attempt to meet his burden of showing "that the proffered evidence might tend to incriminate him." (See Evid. Code, § 404.) As this Court explained,

> "[B]efore a claim of privilege can be sustained, the witness should be put under oath and the party calling him be permitted to begin his interrogation. Then the witness may invoke his privilege with regard to the specific question and the court is in a position to make the decision as to whether the answer might tend to incriminate the witness." [Citations.]

(*People v. Ford*, *supra*, 45 Cal.3d at p. 441.)

As Garrett refused even to take the oath and permit the prosecutor to put any questions to him, the court was prevented from making any determination as to any possible claim of privilege with respect to Garrett's preliminary hearing testimony. Even if Garrett had a potentially valid claim of privilege, the Fifth Amendment does not provide a non-party witness with carte blanche to refuse to participate in any aspect of the court proceedings. In order to meet his burden under Evidence Code section 404, Garrett would, at a minimum, have to have taken the oath, permitted the prosecution to question him at the preliminary hearing, and asserted the privilege as to those questions which he believed could have resulted in self-incrimination. The trial court could then assess Garrett's claim of privilege and rule accordingly. Garrett's failure to do so rendered any possible claim of privilege ineffectual. (See *People v. Ford*, *supra*, 45 Cal.3d at p. 441.)

Clark makes much of the discussion of the possible impact on Garrett's decision to testify at the preliminary hearing from an alleged death threat in a note from Clark to Garrett in the county jail that was intercepted by authorities. (AOB 134-139; V MCRT 921-938, 966-974.) This is of no moment. First of all, the death threat would not provide a lawful basis for Garrett not to testify. Garrett had already been placed in protective custody at the Orange County Jail

prior to being called to testify at the preliminary hearing. (V MCRT 933.) Secondly, Garrett did testify at trial and explained that his decision not to testify at the preliminary hearing was based on his general fear of being labeled a "snitch," and not because he was afraid of Clark. (57 RT 9812-9813.) Clark's threatening note therefore had no impact on Garrett's decision to testify and it is therefore irrelevant to the issue at hand.

Because Garrett made no valid claim of privilege, the prosecution was without power to seek immunity for Garrett under Penal Code section 1324,[16] and the only remaining option to secure his testimony despite his unlawful refusal to take the oath was a charge of contempt. Accordingly, the fact that Garrett testified at trial, both to get the prosecutor to "leave [him] alone" and to avoid another contempt charge (56 RT 9698), was in response to the entirely lawful coercive pressure of Penal Code section 166, and no improper coercion occurred.

XIV.

CLARK HAS FORFEITED HIS CLAIM THAT THE PROCEDURE BY WHICH NENA WILLIAMS IDENTIFIED ANTOINETTE YANCEY'S VOICE AS BEING THAT OF "JANET JACKSON" WAS UNDULY SUGGESTIVE AND, REGARDLESS, THE CIRCUMSTANCES SURROUNDING THE IDENTIFICATION INDICATE NO UNDUE SUGGESTIVENESS

Clark contends that Nena Williams's identification at the preliminary hearing of Antoinette Yancey's voice as being that of "Janet Jackson," the woman who called Ardell Williams and lured her to her death, was unreliable due to the unduly suggestive procedures employed by the prosecution and

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16. Penal Code section 1324, the immunity statute, by its terms, applies only where "a person refuses to answer a question or produce evidence of any other kind on the ground that he or she may be incriminated thereby."

violated his due process rights. (AOB 145-152.) Clark has forfeited this claim by failing to object and, in any event, Williams's identification of Yancey's voice was not the product of an impermissibly suggestive procedure and Clark had ample opportunity to challenge the identification in court.

Although Yancey's attorney objected at the preliminary hearing to Nena Williams identifying Yancey's voice as that of the person who had called Williams's home and identified herself as "Janet" based on Yancey's reading in court two notes written by Ardell Williams (VI MCRT 1441-1448), Clark never joined in, or otherwise objected to the admission of this evidence. Clark's failure to join in Yancey's objection to the procedure whereby Nena Williams identified her voice at the preliminary hearing forfeits the claim on appeal. (See *People v. Sanders* (1990) 51 Cal.3d 471, 508, citing Evid. Code, § 353.)

However, even assuming Clark's challenge to the procedure by which Nena Williams identified Yancey's voice at the preliminary hearing were properly raised in the instant appeal, the claim is without merit. A criminal defendant can challenge the suggestive pretrial identification of a codefendant where other evidence links the two and admission of suggestive pretrial identification evidence would unfairly bolster the prosecution's case against the defendant. (See *People v. Sanders*, *supra*, 51 Cal.3d at p. 508.) As discussed in Argument VII, *ante*, a criminal defendant has the burden of demonstrating that an identification procedure is unreliable. (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 989; *People v. Ochoa*, *supra*, 19 Cal.4th at p. 412.) A trial court's ruling that a pretrial identification procedure is not unduly suggestive involves a mixed question of law and fact that is independently reviewed by an appellate court, although the trial court's determination of historical facts is afforded deference. (*People v. Kennedy*, *supra*, 36 Cal.4th at pp. 608-609.)

In deciding whether admission of identification evidence violates a defendant's right to due process, a reviewing court determines:

> (1) whether the identification procedure was unduly suggestive and unnecessary, and, if so, (2) whether the identification itself was nevertheless reliable under the totality of the circumstances, taking into account such factors as the opportunity of the witness to view the suspect at the time of the offense, the witness's degree of attention at the time of the offense, the accuracy of his or her prior description of the suspect, the level of certainty demonstrated at the time of the identification, and the lapse of time between the offense and the identification.

(*People v. Cunningham*, *supra*, 25 Cal.4th at p. 989.)

" 'If, and only if, the answer to the first question is yes and the answer to the second is not, is the identification constitutionally unreliable.' " (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 412.)

To determine whether a procedure is unduly suggestive, this Court determines whether anything caused the defendant to stand out from the others in a way to suggest the witness should select him. (*People v. Yeoman*, *supra*, 31 Cal.4th at p. 124.) A procedure which suggests in advance of identification by the witness the identity of the person suspected by the police is unfair. (*People v. Ochoa*, *supra*, 19 Cal.4th at p. 413.)

Nena Williams repeatedly identified Yancey's voice as that of Janet Jackson, the person who had called the Williams's home and lured Ardell Williams to her death. First, Nena Williams identified Janet's voice as one of four voices played to her on tapes by police. When playing the tapes, the officer merely asked if Williams recognized Janet's voice among any of the four. (VI MCRT 1219-1220.) She was never advised that the voice of a defendant in the case was on any of the tapes or that there would be a voice she recognized. Further, both Yancey's counsel and Clark were able to cross-examine Williams at length at the preliminary hearing regarding the

circumstances of her identification. (VI MCRT 1372-1387, 1395-1400.) There was nothing suggestive or improper in this procedure.

During Yancey's cross-examination of Williams, a tape prepared by the defense attorneys for both Yancey and Clark containing five voices was played for Williams. She indicated that two of the five voices, voices three (Yancey's) and five, sounded familiar, but that the fifth voice sounded most like Janet. (VI MCRT 1286, 1386-1395, 1444.)

It was only then that the prosecutor asked that Yancey read notes written by Ardell Williams during her conversations with Janet in court in order to clarify the two earlier identifications. (VI MCRT 1441.) After Yancey read the notes in court, Williams was asked whether she recognized Yancey's voice and Williams indicated that Yancey's voice was that of Janet. (VI MCRT 1450-1451.) Clark, Yancey, and their respective counsels were present in court when this occurred and were able to observe and challenge any unduly suggestive aspects of the identification procedure.

Even assuming the identification testimony offered by Nena Williams was not "the most reliable,"

> " 'It is part of our adversary system that we accept at trial much evidence that has strong elements of untrustworthiness - an obvious example being the testimony of witnesses with a bias. While identification testimony is significant evidence, such testimony is still only evidence, and, unlike the presence of counsel, is not a factor that goes to the very heart - the "integrity" - of the adversary process.
>
> " 'Counsel can both cross-examine the identification witnesses and argue in summation as to factors causing doubts as to the accuracy of the identification - including reference to both any suggestibility in the identification procedure and any countervailing testimony such as alibi.'"

(*People v. Gordon* (1990) 50 Cal.3d 1223, 1243, overruled on other grounds in *People v. Edwards* (1991) 54 Cal.3d 787, 835, citing *Manson v. Brathwaite*, *supra*, 432 U.S. at pp. 113-114, fn. 14.)

Clark had ample opportunity to challenge Nena Williams's identification of Yancey's voice both at the preliminary hearing and at trial, and did so at length. (VI MCRT 1372-1387, 1395-1400; 53 RT 9347-9349; 54 RT 9386-9395.) No due process violation occurred. (See *People v. Gordon*, *supra*, 50 Cal.3d at p. 1243.)

XV.

CLARK HAS FORFEITED HIS CLAIM THAT THE PROCEDURE BY WHICH ANGELITA WILLIAMS IDENTIFIED ANTOINETTE YANCEY'S VOICE AS BEING THAT OF JANET JACKSON WAS UNDULY SUGGESTIVE AND, REGARDLESS, THE CIRCUMSTANCES SURROUNDING THE IDENTIFICATION INDICATE NO UNDUE SUGGESTIVENESS

Clark raises the identical challenge as that in Argument XIV, *ante*, to Angelita Williams's identification of Yancey's voice as that of Janet Jackson at the preliminary hearing. (AOB 153-159.) For the same reasons discussed in Argument XIV, *ante*, Clark's claim is forfeited based on his failure to object in the trial court and, in any event, Angelita Williams's identification of Yancey's voice (VII MCRT 1621; VIII MCRT 1721-1739; IX MCRT 1828-1832, 1850-1854) was not the result of unduly suggestive identification procedures. (See *People v. Sanders*, *supra*, 51 Cal.3d at pp. 508-509.)

XVI.

DEFENSE INVESTIGATOR ALAN CLOW'S PRELIMINARY HEARING TESTIMONY REGARDING THE DATES AND TIMES OF TWO INTERVIEWS HE CONDUCTED WITH ARDELL WILLIAMS PRIOR TO HER MURDER DID NOT INVOLVE THE DISCLOSURE OF INFORMATION PROTECTED BY EITHER THE ATTORNEY-CLIENT OR WORK PRODUCT PRIVILEGES

Clark contends that the trial court improperly ordered Defense Investigator Alan Clow to testify at the preliminary hearing regarding the dates and times of two interviews he conducted with Ardell Williams prior to her death. Clark claims this disclosure violated the attorney-client and work product privileges. (AOB 160-171.) However, Clow's testimony was not privileged, as it did not involve a confidential communication between Clark and his attorney or disclose any writing reflecting his attorney's thought processes or strategy.

Evidence Code section 954 creates a privilege for the non-disclosure of "a confidential communication between client and lawyer." (*2,022 Ranch, L.L.C. v. Superior Court* (2003) 113 Cal.App.4th 1377, 1387.) Evidence Code section 952 defines a "confidential communication between client and lawyer" as,

> information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

The party asserting the attorney-client privilege has the burden of demonstrating the applicability of the privilege. (*Doe 2 v. Superior Court* (2005) 132 Cal.App.4th 1504, 1522.) A trial court's determination regarding

the applicability of the privilege will only be disturbed upon a showing of an abuse of discretion. (See *id.* at p. 1521.)

Clark's claim that his attorney-client privilege was violated when Defense Investigator Alan Clow was permitted to testify at the preliminary hearing as to the dates and times of two meetings he had with Ardell Williams at her home prior to her murder (X MCRT 2098-2119; XI MCRT 2221-2224) fails because Clow did not disclose any confidential communication between Clark and his attorney, as required under Evidence Code section 954.

"[A]s is apparent on the face of the code section, it is essential to a claim of privilege that there be a communication." (*Grand Lake Drive In, Inc. v. Superior Court* (1960) 179 Cal.App.2d 122, 125-126.) "It is apparent that some ingredient of disclosure or revelation is essential to the element of communication." (*Id.* at p. 126.) Further, the attorney-client privilege "does not protect 'independent facts related to a communication; that a communication took place, and the time, date and participants in the communication.' [Citation.]" (*2,022 Ranch, L.L.C. v. Superior Court*, *supra*, 113 Cal.App.4th at p. 1388.)

Clark failed to demonstrate that any communication occurred between himself and his attorney that was disclosed by Clow testifying to the dates and times of his two meetings with Ardell Williams. Clow did not discuss what took place during his meetings with Williams, but only the fact of those meetings' occurrence. Although Clark claims that this disclosure allowed the prosecution to "learn privileged details about defense efforts," he fails to identify what details were learned. (AOB 167.) The only thing disclosed was that Clow had met twice with Williams at her home. It revealed nothing about whether the defense intended to call her as a witness at trial, how it intended to challenge her testimony, or other details of defense strategy. Further, even if such details could be gleaned from Clow's testimony about the dates and times of his two meetings with Williams, this information would be of no utility in the

present prosecution because Williams had been murdered and was no longer available as a witness or to be cross-examined. The defense strategy with regard to Williams, of necessity, had to change upon her death. Accordingly, because no communication was disclosed by Clow, Clark's claim of attorney-client privilege fails. (See *Grand Lake Drive In, Inc. v. Superior Court*, *supra*, 179 Cal.App.2d at pp. 125-126.)

Similarly, Clow's testimony regarding the dates and times of his two interviews with Ardell Williams prior to her murder was not protected by the work product privilege. Code of Civil Procedure section 2018.030 creates a privilege against the disclosure of the work product of an attorney.[17] Under the section, "an attorney's 'core' work product, defined as '[a]ny writing reflecting an attorney's impressions, conclusions, opinions, or legal research or theories'" is absolutely protected from disclosure and there is a "conditional or qualified protection for 'general' work product, which bars discovery of other aspects of an attorney's work product unless denial of discovery would unfairly prejudice a party or result in an injustice." (*2,022 Ranch, L.L.C. v. Superior Court*, *supra*, 113 Cal.App.4th at p. 1390; Code Civ. Proc., § 2018.030.)

However, this Court has explained,

> that [Penal Code] section 1054.6 expressly limits the definition of "work product" *in criminal cases* to "core" work product, that is, any writing reflecting "an attorney's impressions, conclusions, opinions, or legal research or theories." Thus, the qualified protection of certain materials under Code of Civil Procedure section 2018, subdivision (b), applicable

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17. Former Code of Civil Procedure section 2018, enacted in 1987 and setting forth the work product privilege, was repealed in 2004 and replaced by new Code of Civil Procedure sections 2018.010 to 2018.080 addressing the same subject matter. (Stats. 2004, ch. 182, §§ 22-23.) The repeal of section 2018 was intended to "facilitate nonsubstantive reorganization of the rules governing civil discovery" and the newly enacted sections are intended to restate "existing law relating to protection of work product" and not to "expand or reduce the extent to which work product is discoverable under existing law." (33 Cal. Law Revision Com. Rep. (2004) 809; Code Civ. Proc., § 2018.040.)

> in civil cases, is no longer available in criminal cases. The more recent statute limiting the definition of work product in criminal cases carves out an exception to the older work product rule applicable to civil and criminal cases alike. [Citation.]

(*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 382, fn. 19 (original emphasis).)

As the above authorities demonstrate, the work product privilege was not implicated by Clow's testimony regarding the dates and times of his two interviews with Ardell Williams. Clow never disclosed or made reference to any writing when testifying to the dates and times of his two interviews with Ardell Williams. Accordingly, the work product privilege was inapplicable and Clark's claim must fail. (*Ibid.*)

However, even assuming Clow's testimony was privileged and therefore improperly admitted at the preliminary hearing, any error was harmless. As discussed in Argument II, *ante*, irregularities at the preliminary require reversal only if the defendant "can show that he was deprived of a fair trial or otherwise suffered prejudice as a result of the error at the preliminary examination." (*People v. Pompa-Ortiz*, *supra*, 27 Cal.3d at p. 529.)

Both the attorney-client and work product privileges are purely creations of state statutory law. (*Gonzales v. Municipal Court* (1977) 67 Cal.App.3d 111, 118 [attorney-client privilege]; *Izazaga v. Superior Court*, *supra*, 54 Cal.3d at p. 381 [work product].) They are therefore subject to state law harmless error analysis under *People v. Watson*, *supra*, 46 Cal.2d at 836, and will only result in reversal where it is reasonably probable that the defendant would have received a more favorable outcome had the challenged evidence not been admitted. (See *People v. Roldan* (2005) 35 Cal.4th 646, 725 [attorney-client privilege]; *People v. Collie* (1981) 30 Cal.3d 43, 60-61, abrogated on other grounds by state constitutional amendment as recognized in *Izazaga v. Superior Court*, *supra*, 54 Cal.3d at pp. 371-372 [work product].)

Here, it is not reasonably probable Clark would have obtained a more favorable result at the preliminary hearing had Clow not testified as to the dates and times of his two in-person interviews with Williams. As discussed in Argument II, *ante*, the prosecution presented ample evidence during the lengthy preliminary hearing to establish probable cause that Clark committed the charged offenses, irrespective of Clow's testimony. Clark was later tried by a jury and found guilty of the charges by the higher standard of proof beyond a reasonable doubt. Accordingly, it is not reasonably probable that Clark would have obtained a more favorable result had evidence of the dates and times of the two interviews with Williams not been admitted and any error was harmless. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

XVII.

ANTOINETTE YANCEY'S STATEMENTS MADE WHILE SHE POSED AS A FLOWER DELIVERY PERSON AND AS JANET JACKSON WERE PROPERLY ADMITTED AT TRIAL AS NON-HEARSAY AND, IN ANY EVENT, THE ADMISSION OF A CO-CONSPIRATOR EXCEPTION TO THE HEARSAY RULE WAS SATISFIED

Clark contends that the trial court improperly admitted hearsay statements made by Yancey when she delivered flowers to Ardell Williams on February 10, 1994, and in her telephone conversations as Janet Jackson with Williams and members of her family, where there was an insufficient showing of a conspiracy between Yancey and Clark to murder Williams. He also contends that these statements were testimonial in nature and their admission violated the Confrontation Clause under *Crawford v. Washington* (2004) 541 U.S. 36 [124 S.Ct. 1354, 158 L.Ed.2d 177]. (AOB 172-178.) While Clark failed to object on either hearsay or Confrontation Clause grounds and therefore forfeited the claim on appeal, the evidence was nonetheless properly admitted

for the non-hearsay purpose of establishing the existence of a conspiracy and as a statement of a conspirator.

First, Clark did not make a hearsay objection in the trial court to testimony regarding Yancey's statements. (53 RT 9300-9321, 9440-9472.) Clark's failure to make an objection forfeits the claim on appeal. (Evid. Code, § 353; see *People v. Harrison* (2005) 35 Cal.4th 208, 239; *People v. Szeto* (1980) 29 Cal.3d 20, 32.)

In any event, Yancey's statements during the flower delivery and during the Janet Jackson phone calls were properly admitted. As discussed in Argument XI, *ante*, Evidence Code section 1200, subdivision (a) defines hearsay as an out-of-court statement offered to prove the truth of the matter asserted. (*People v. Crew*, *supra*, 31 Cal.4th at p. 841.) Hearsay statements are inadmissible unless an exception to the hearsay rule applies. (Evid. Code, § 1200, subd. (b); *People v. Hardy*, *supra*, 2 Cal.4th at p. 139.)

Yancey's statements were admissible for the non-hearsay purpose of demonstrating the existence of a conspiracy between Yancey and Clark to murder Ardell Williams. (See *People v. Noguera*, *supra*, 4 Cal.4th at pp. 624-625.) The truth of Yancey's statements were of no importance to the prosecution's case. Indeed, the statements were patently untrue. Yancey was not a flower delivery person and no flowers had been sent to Ardell Williams. Janet Jackson did not exist and there was no job interview for Williams at Continental Receiving. The importance of the statements were not their truth, but instead, the fact that they were made at all. The statements demonstrated Yancey's role in helping Clark to murder Ardell Williams by luring Williams from her home to the nearby Continental Receiving yard where she was murdered.

Yet, even assuming that Yancey's statements were offered for their truth, they were admissible under Evidence Code section 1223 as an exception to the hearsay rule. A trial court's admission of evidence under a hearsay exception

is reviewed for an abuse of discretion. (*People v. Martinez*, *supra*, 22 Cal.4th at p. 120.) A trial court similarly has broad discretion in determining whether the proponent of evidence has established the necessary foundational requirements for the application of a hearsay exception. (*Ibid.*) The trial court's,

> ruling on admissibility "implies whatever finding of fact is prerequisite thereto; a separate or formal finding is, with exceptions not applicable here, unnecessary. [Citation.]" [Citation.]

(*Ibid.*)

Under Evidence Code section 1223, hearsay statements are admissible if the proponent of the evidence "presents 'independent evidence to establish prima facie the existence of . . . [a] conspiracy.'" (*People v. Hardy*, *supra*, 2 Cal.4th at p. 139.)

> Once independent proof of a conspiracy has been shown, three preliminary facts must be established: "(1) that the declarant was participating in a conspiracy at the time of the declaration; (2) that the declaration was in furtherance of the objective of that conspiracy; and (3) that at the time of the declaration the party against whom the evidence is offered was participating or would later participate in the conspiracy."

(*Ibid.*)

The prosecution presented ample evidence of a conspiracy between Yancey and Clark to murder Ardell Williams. Ardell Williams's grand jury testimony detailing her knowledge of Clark's involvement in the Comp USA robbery and murder and her subsequent cooperation with the police was admitted, thereby supplying the motive for her murder to prevent her from testifying at Clark's trial. (50 RT 8739-8793.) This was confirmed by Clark's statement to Alonzo Garrett that "[t]his is the woman right here that could put me away." (56 RT 9715.)

Yancey's relationship to Clark and participation in the murder plot was also well-established by her phone records for the period of January through

March 1994, which indicated numerous calls to Clark's attorney, his investigator, a pay phone in the Orange County Jail accessible to Clark, and to Ardell Williams's home. (60 RT 10156-10157.) Yancey visited Clark at the Orange County Jail less than an hour after Williams's body was discovered. (54 RT 9513-9521; 55 RT 9550; 60 RT 10155.)

During the search of Yancey's apartment, police found an income tax return and receipts in Clark's name and a receipt in Eric Clark's name. (55 RT 9558-9559.) There was also a file marked "Billy" and numerous letters from Clark to Yancey in the apartment. (55 RT 9565-9581.)

In a voice lineup, Williams's mother and sister identified Antoinette Yancey's voice as being that of Janet Jackson. (54 RT 9409-9412, 9499-9502; 55 RT 9586-9591.) Williams's mother and sister also identified Yancey in a photo lineup as the person who had delivered the flowers to Williams. (55 RT 9591-9594.) Yancey's fingerprints were also found on the box the flowers were delivered in. (57 RT 9951.) Further, after her arrest, Yancey spoke to a friend on the phone and told him that she had been arrested because she had delivered flowers to someone who was later found murdered. (56 RT 9636-9637.)

Based on this evidence, the trial court could properly conclude that the prosecution had met its burden of establishing prima facie evidence that a conspiracy to murder Ardell Williams existed, that both Yancey and Clark were involved in the conspiracy, and that Yancey was acting in furtherance of the conspiracy when she delivered the flowers to Williams's home, which introduced her to Williams's mother and sister whom she would later speak to on the phone as Janet, and made the Janet Jackson phone calls, which lured Williams to her death. Accordingly, Yancey's statements were also admissible for their truth under Evidence Code section 1223. (See *Ibid.*)

Similarly, the admission of Yancey's statements did not violate the Confrontation Clause. First of all, Clark failed to object under the

Confrontation Clause at trial, thereby forfeiting the claim on appeal. Failure to assert the Confrontation Clause as grounds for challenging an evidentiary ruling in the trial court should waive the issue on appeal. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 869; but see *People v. Johnson* (2004) 121 Cal.App.4th 1409, 1411, fn. 2 [Confrontation Clause objection not forfeited where trial occurred before decision in *Crawford*].) This Court has twice declined to decide whether a defendant tried before *Crawford* was decided forfeits an appellate challenge to the admission of testimonial evidence in violation of the Confrontation Clause under *Crawford* due to the failure to raise the issue at trial. (See *People v. Harrison*, *supra*, 35 Cal.4th at p. 239; *People v. Monterroso* (2004) 34 Cal.4th 743, 763.) Accordingly, it is an open question whether Clark forfeited a Confrontation Clause challenge to the evidence based on his lack of objection.

Even if Clark's claim is not waived, *Crawford* is inapplicable to the challenged statements of Yancey. In *Crawford v. Washington*, *supra*, 541 U.S.at p. 68, the United States Supreme Court held that,

> admission of testimonial evidence from a witness who does not testify violates the Confrontation Clause, unless the witness is unavailable and the defendant has had a prior opportunity for cross-examination.

(*People v. Mitchell* (2005) 131 Cal.App.4th 1210, 1221.) Without defining the phrase "testimonial,"[18] the high court noted four types of statements that were of particular constitutional concern:

> (1) "'ex parte in-court testimony or its functional equivalent--that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially' "; (2) "'extrajudicial statements . . . contained in formalized testimonial

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18. The issue of how "testimonial" is to be defined under the Confrontation Clause is pending before this Court in *People v. Cage*, review granted October 13, 2004, S127344.

> materials, such as affidavits, depositions, prior testimony, or confessions'"; (3) "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial'"; and (4) "[s]tatements taken by police officers in the course of interrogations."

(*Ibid.*, citing *Crawford v. Washington*, *supra*, 541 U.S. at pp. 51-52, 124 S.Ct. 1354.)

The high court noted that non-testimonial hearsay, a category in which the court expressly included statements in furtherance of a conspiracy, did not implicate the Confrontation Clause. (*People v. Mitchell*, *supra*, 131 Cal.App.4th at pp. 1221-1222, citing *Crawford v. Washington*, *supra*, 541 U.S. at p. 56, fn. omitted.) As discussed above, Yancey's statements while posing as the flower delivery person and as Janet Jackson were offered as non-hearsay evidence of a conspiracy, and, to the extent they were offered for their truth, fell under the statement of a conspirator exception to the hearsay rule. Neither theory of admissibility fell afoul of *Crawford* and the Confrontation Clause. (See *Crawford v. Washington*, *supra*, 541 U.S. at pp. 56, 68.)

Nonetheless, even assuming Yancey's statements were improperly admitted under state hearsay rules, Clark's claim fails for want of a showing of prejudice. Error in the "application of ordinary rules of evidence" is reviewed under the harmless error standard articulated in *People v. Watson*, *supra*, 46 Cal.2d at 836, and will only result in reversal where it is reasonably probable that the defendant would have received a more favorable outcome had the challenged evidence not been admitted. (*People v. Harris*, *supra*, 37 Cal.4th at p. 336.)

As discussed above, Yancey's statements while posing as the flower delivery person and as Janet Jackson were really not important for their truth and there was ample evidence of the conspiracy between Yancey and Clark to murder Williams independent of the statements. Accordingly, it is not reasonably probable that Clark would have obtained a more favorable result had

the challenged statements not been admitted and any error was harmless. (See *People v. Watson*, *supra*, 46 Cal.2d at p. 836.)

XVIII.

CLARK FORFEITED HIS CLAIM THAT THE ADMISSION AT THE PRELIMINARY HEARING OF ARDELL WILLIAMS'S GRAND JURY TESTIMONY AND POLICE INTERVIEW STATEMENTS VIOLATED THE CONFRONTATION CLAUSE BY FAILING TO OBJECT ON CONFRONTATION CLAUSE GROUNDS AND, IN ANY EVENT, THE ADMISSION OF THE EVIDENCE DID NOT VIOLATE THE CONFRONTATION CLAUSE BECAUSE THE STATEMENTS WERE OFFERED FOR NON-HEARSAY PURPOSES

Clark contends that Ardell Williams's grand jury testimony and interviews with police were improperly admitted at the preliminary hearing in violation of the Confrontation Clause, and specifically the rule set forth by the United States Supreme Court in *Crawford v. Washington*, *supra*, 541 U.S. 36. (AOB 179-186.) Clark's claim was forfeited by his lack of objection at the preliminary hearing and, in any event, *Crawford* and the Confrontation Clause were not implicated because Williams's statements were admitted for non-hearsay purposes.

As discussed in Argument XVII, *ante*, Clark forfeited any objection on Confrontation Clause grounds by failing to object under the Confrontation Clause at the preliminary hearing to the admission of Williams's grand jury testimony or police interviews. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 869; but see *People v. Johnson*, *supra*, 121 Cal.App.4th at p. 1411, fn. 2 [Confrontation Clause objection not forfeited where trial occurred before decision in *Crawford*].)

Further, this Court has previously held that the federal Constitution does not require that a preliminary hearing "'include traditional adversary safeguards

such as the right of confrontation'" and that the use of hearsay at a preliminary hearing does not violate the Confrontation Clause. (*Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1081.) Accordingly, *Crawford* is inapplicable to Williams's statements introduced at the preliminary hearing. (See *Ibid.*)

In any event, the admission of the evidence did not violate the Confrontation Clause. As discussed in Argument XVII, *ante*, the high court in *Crawford* held that the admission of testimonial hearsay statements is permissible under the Confrontation Clause where the declarant is unavailable and there was a prior opportunity for cross-examination. (*Crawford v. Washington*, *supra*, 541 U.S. at p. 68.) *Crawford* only addressed the admissibility of hearsay evidence, defined in California as "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated." (Evid. Code, § 1200.) The challenged statements here were not offered for their truth and were never considered as such by the magistrate at the preliminary hearing.

The prosecution originally sought to offer Williams's grand jury testimony and interview statements at the preliminary hearing pursuant to Evidence Code section 1350, the hearsay exception for statements of an unavailable declarant. (1 MCCT 119-120.) However, at the preliminary hearing, the prosecution abandoned Evidence Code section 1350 as a theory of admissibility, arguing instead that the statements were being offered for the non-hearsay purposes of proving the corpus of the murder of a witness special circumstance by establishing that Williams was a witness against Clark (Pen. Code, § 190.2, subd. (a)(10)) and by demonstrating Clark's knowledge that Williams was a material witness in the case pending against him at the time of her murder. (X MCRT 2119-2121.)

At the hearing on Clark's motion to dismiss under Penal Code section 995, Clark's counsel expressly agreed that Williams's grand jury testimony and police interviews had been offered at the preliminary hearing for non-hearsay

purposes and not for the truth of the matter asserted. (3 RT 1132, 1146.) The trial court, in considering the 995 motion, explained its view with regard to Williams's statements offered at the preliminary hearing,

> It would appear to the court that, since I am reviewing the preliminary hearing, that any restrictions placed on the hearsay use of those statements which the magistrate acknowledged would be my standard in reviewing. That does not mean that this court would be bound one way or the other during a trial in this court. It's my review standard, and if the evidence was submitted at the preliminary hearing for purposes other than the truth of the matter asserted, and the record appears to support that, then that will be the standard this court will apply in deciding whether or not it believes the magistrate had adequate probable cause for the bind over without prejudice to whatever develops at trial in this court, should the matter proceed to trial. So that will be the standard I'm applying. [¶] They were not, as I read the lower court proceedings, they were not offered, used or received for the truth of the matter asserted, and in reviewing that court's decision, I will assume and use the same standard, the non-hearsay purposes will be given weight in the court's ruling, and review, the hearsay purposes weren't used there and won't be used myself.

(3 RT 1145-1147.)

Under *Crawford*, the admission at the preliminary hearing of Williams's grand jury testimony and police interviews did not implicate the Confrontation Clause because they were not hearsay and were not considered for their truth. (See *Crawford v. Washington*, *supra*, 541 U.S. at p. 68.) Indeed, Clark's lack of a prior opportunity to cross-examine Williams, the core concern identified in *Crawford* with regard to the admission of testimonial hearsay, was irrelevant because cross-examination could only serve to challenge the content of the statements and the content was expressly not considered by the court at the preliminary hearing. (See *Id.* at pp. 54-56.) Cross-examination would not have altered the fact that the statements were made by Williams and that the statements were made in regards to Clark and the Comp USA case. The statements merely established that Williams was a witness against Clark and that Clark had knowledge of this fact and these facts existed independently of

whether information Williams asserted therein was true or not. Accordingly, admission of Williams's grand jury testimony and police interviews as non-hearsay did not violate the Confrontation Clause under *Crawford*. (See *id.* at p. 68.)

However, even assuming the Confrontation Clause were applicable to Ardell Williams's statements admitted at the preliminary hearing, Clark procured Williams's unavailability by murdering her and, therefore, the doctrine of forfeiture by wrongdoing disposes of any confrontation claim Clark might raise. As the United States Supreme Court explained in *Crawford*, "the rule of forfeiture by wrongdoing (which we accept) extinguishes confrontation claims on essentially equitable grounds."[19] (*Id.* at p. 62. As the United States Supreme Court explained in *Davis v. Washington* (2006) ___ U.S. ___ [___ S.Ct. ___, ___ L.Ed.2d ___][2006 WL 1667285, *12] [remanding case to state court to determine if forfeiture by wrongdoing exception applied],

> [W]hen defendants seek to undermine the judicial process by procuring or coercing silence from witnesses and victims, the Sixth Amendment does not require courts to acquiesce. While defendants have no duty to assist the State in proving their guilt, they do have the duty to refrain from acting in ways that destroy the integrity of the criminal-trial system. We reiterate what we said in *Crawford*: that "the rule of forfeiture by wrongdoing . . . extinguishes confrontation claims on essentially equitable grounds." [Citation.] That is, one who obtains the absence of a witness by wrongdoing forfeits the constitutional right to confrontation.

A number of federal courts have applied the doctrine of forfeiture by wrongdoing in cases where defendants have claimed that hearsay statements were improperly admitted. (*United States v. Gray* (4th Cir. 2005) 405 F.3d 227,

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19. This Court granted review on December 22, 2004, S129852, in *People v. Giles* (2004) 123 Cal.App.4th 475, to consider the question of whether the doctrine of forfeiture by wrongdoing applies where the defendant murdered the declarant to procure her unavailability and where that murder is the same act for which the defendant is on trial.

240-243 [hearsay statements of victim prior to murder admitted under forfeiture by wrongdoing exception]; *United States v. Garcia-Meza* (6th Cir. 2005) 403 F.3d 364, 370-371 [defendant forfeited rights under Confrontation Clause by killing declarant]; *United States v. Rodriguez-Marrero* (1st Cir. 2004) 390 F.3d 1, 17 [forfeiture by wrongdoing is an independent ground for admissibility of hearsay and exception to Confrontation Clause that survives *Crawford*].)

Here, the magistrate, in finding probable cause to hold Clark to answer charges that he conspired to, and did, murder Ardell Williams and that her murder was committed pursuant to Penal Code section 190.2, subdivision (a)(10) for the purpose of preventing her from testifying at trial, implicitly found that Clark's wrongdoing was responsible for her absence at the proceedings. Accordingly, under the doctrine of forfeiture by wrongdoing recognized by the United States Supreme Court in *Crawford* and *Davis*, Clark forfeited any confrontation claim based on her absence. (See *Ibid.*)

XIX.

CLARK'S FAILURE TO EXERCISE HIS PEREMPTORY CHALLENGES TO REMOVE PROSPECTIVE JURORS HE CONTENDS HAD A PRO-DEATH BIAS FORFEITS HIS CLAIM ON APPEAL AND, IN ANY EVENT, THE TRIAL COURT CORRECTLY DENIED THE CHALLENGES FOR CAUSE BECAUSE THE PROSPECTIVE JURORS' VIEWS ON THE DEATH PENALTY WOULD NOT PREVENT OR SUBSTANTIALLY IMPAIR THEM IN THE PERFORMANCE OF THEIR DUTIES

Clark contends that the trial court improperly denied challenges for cause to a number of impermissibly pro-death oriented prospective jurors at both his first trial and the penalty-phase retrial and that his ability to exercise peremptory challenges was therefore infringed. (AOB 187-234.) However, Clark has forfeited his claim by failing to exercise his peremptory challenges to remove

the challenged jurors and, in any event, the trial court correctly denied the challenges for cause because the prospective jurors' views on the death penalty would not prevent or substantially impair them in the performance of their duties as jurors.

Clark's attack on the trial court's denial of challenges for cause made against allegedly pro-death jurors is forfeited based on his failure to exercise peremptory challenges as to these jurors. (*People v. Danielson* (1992) 3 Cal.4th 691, 713, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) Additionally, as this Court has noted:

> "To preserve a claim of error in the denial of a challenge for cause, the defense must either exhaust its peremptory challenges and object to the jury as finally constituted or justify the failure to do so." [Citations.]

(*People v. Lucas* (1995) 12 Cal.4th 415, 480.)

Clark concedes that, during jury selection at both the first trial and the penalty phase retrial, he failed to exhaust his peremptory challenges or to exercise peremptory challenges as to the challenged jurors. (AOB 226-228.) He also did not object to the jury as finally constituted. (41 RT 7308-7309.)

Clark attempts to excuse his failure to exhaust his peremptory challenges by claiming that the trial court's erroneous denial of challenges for cause as to the challenged jurors denied him his right to a full panel of qualified jurors before he exercised his peremptory challenges and that,

> [u]nder these circumstances, non-exhaustion of peremptory challenges is not a waiver, but a legitimate and necessary response to the error of failing to exclude unqualified jurors from the panel.

(AOB 227-228.) Clark fails to establish how not using peremptory challenges to excuse the challenged jurors was necessary or that the alleged error in refusing challenges for cause interfered with or prevented his exercise of peremptory challenges. If Clark truly believed that impermissibly pro-death jurors would be serving on his jury, the use of his peremptory challenges as to

these jurors would be more, and not less, critical. California law demands that a defendant exhaust his peremptory challenges in order to preserve the issue for appeal and the trial court's rulings on the challenges for cause placed no bar or impediment to Clark's exercise of his peremptory challenges. Accordingly, Clark has forfeited his attack on the trial court's denial of challenges for cause. (See *Ibid.*)

Regardless of Clark's forfeiture of the issue, his claim also fails on the merits.

> "'In a capital case, a prospective juror may be excluded if the juror's views on capital punishment would "prevent or substantially impair" the performance of the juror's duties.' [Citations.] 'A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate.' [Citation.]" [Citation.]

(*People v. Jenkins*, *supra*, 22 Cal.4th at p. 987.)

"The determination of a juror's qualifications falls ' "within the wide discretion of the trial court, seldom disturbed on appeal."'" (*People v. Haley* (2004) 34 Cal.4th 283, 306.) A reviewing court will uphold a trial court's determination regarding a juror's views on capital punishment and whether they would prevent or substantially impair the performance of the juror's duties so long as they are supported by substantial evidence, " ' "accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous." ' " (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 987; see also *People v. Wilson* (2005) 36 Cal.4th 309, 324.)

Clark focuses on twelve prospective jurors at the first trial and five prospective jurors at the penalty phase retrial who, based on their statements during voir dire, he alleges demonstrated a pro-death bias. (AOB 191-212, 216-221.) The trial court and counsel examined each of these jurors at length regarding their views on the death penalty and their ability and willingness to

perform their duties as jurors. (18 RT 3586-3602 [Juror BF], 3638-3654 [Juror DM]; 19 RT 3965-3978 [Juror JC]; 20 RT 4151-4161 [Juror WP]; 23 RT 4485-4511 [Juror BA[20]]; 24 RT 4649-4658 [Juror AI]; 27 RT 5154-5166 [Juror MW], 5213-5222 [Juror DB]; 29 RT 5545-5555 [Juror LT]; 31 RT 5805-5814 [Juror SH]; 32 RT 5985-5993 [Juror LW]; 36 RT 6506-6514 [Juror RM]; 74 RT 12458-76 RT 13039 [penalty phase retrial jurors].) Clark ignores the numerous statements each of these prospective jurors made indicating their willingness to set aside any personal feelings regarding the death penalty and to follow the oath and the trial court's instructions. When the statements of these jurors are viewed in their entirety, it is clear that they also made statements that were contradictory to those relied on by Clark. As this Court has observed,

> "In many cases, a prospective juror's responses to questions on voir dire will be halting, equivocal, or even conflicting. Given the juror's probable unfamiliarity with the complexity of the law, coupled with the stress and anxiety of being a prospective juror in a capital case, such equivocation should be expected. Under such circumstances, we defer to the trial court's evaluation of a prospective juror's state of mind, and such evaluation is binding on appellate courts."

(*People v. Moon* (2005) 37 Cal.4th 1, 15-16, quoting *People v. Fudge* (1994) 7 Cal.4th 1075, 1094.)

For instance, Clark focuses on statements made by jurors BF, DM, BA, AI, MW, LT, SH, LW, RM, HF, KH, RL, and KM, that he characterizes as impermissibly pro-death. (AOB 191-221.) None of the juror statements cited by Clark were impermissibly pro-death or indicative of a bias of any sort. Moreover, each juror made statements that indicated their willingness to follow the court's instructions and not allow their personal feelings to get in the way of making an objective decision. While juror BF did indicate that he "usually feel[s] that the death penalty is justified in cases of murder," he also indicated

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20. The trial court dismissed juror BA for medical reasons pursuant to a stipulation by the parties. (23 RT 4516-4518.)

that he would follow the court's instruction and would render a verdict of life without parole if he felt the factors in mitigation outweighed the factors in aggravation. (18 RT 3586, 3589, 3599.) Juror DM expressly indicated that he had "no impairment" in his ability to give equal consideration to both death and life without parole as possible sentences. (18 RT 3640.) Juror AI indicated that he would not automatically vote for the death penalty, but would consider all of the factors and would be open to punishment other than death. (24 RT 4650, 4653-4655.) Juror MW, despite some confusion regarding his answers (27 RT 5167-51830), indicated that his ability to weigh and consider all the evidence and consider both death and life without parole would not be substantially impaired by feelings about the death penalty. (27 RT 5187.) Juror LT also was somewhat equivocal in her answers, but, when confronted with the ambiguity, indicated that she could "keep an open mind on penalty until everything had been presented and [she] had weighed it." (29 RT 5555.) Juror SH explained that he could consider both death and life without parole and would not have a predisposition to either. (31 RT 5807-5809.) Juror LW expressly stated "I would consider both life without parole and the death penalty." (32 RT 5993.) Juror RM indicated that could give "fair consideration" to both the death penalty and life without parole. (36 RT 6508.) Juror HF indicated that she was "on the fence" and could decide either for death or life without parole based on the evidence. (76 RT 12965.) Juror KH indicated that "every individual should receive [an] unbiased fair trial" and that she would be willing to consider all factors before deciding on the penalty. (28 CT (Juror Questionnaires) 6896, 6901.) Juror CP indicated that she was willing to follow the court's instructions regarding the factors to consider in making a penalty determination and that she considered life without parole to be an acceptable alternative to death. (39 CT (Juror Questionnaires) 9922-9924.) Juror RL also indicated that he would follow the court's instructions regarding determining penalty. (40 CT (Juror Questionnaires) 10170.) Juror KM similarly indicated that she was willing to

follow the court's instructions regarding the factors to consider in making a penalty determination and that she considered life without parole to be an acceptable alternative to death. (37 CT (Juror Questionnaires) 9257-9259.) The statements of the jurors supported the trial court's determination that their views on the death penalty would not substantially impair the performance of their duties.

Similarly, although Juror JC indicated that she was a religious person (20 RT 3966, 3972-3978), she also indicated that her decision regarding penalty would depend on the circumstances of the case and that, if the evidence supported a finding of life without parole, she would vote accordingly. (20 RT 3967, 3978.) Nothing about Juror JC's religious views indicated that she would not follow the court's instructions and she expressly indicated that her views on the death penalty would not substantially impair her in the performance of her duties as a juror. (20 RT 3967-3968.)

Clark also claims that Jurors HF, KH, and CP should have been questioned regarding their psychology studies, disclosed in their juror questionnaires. (AOB 216-219.) Clark provides no support for his bare supposition that a knowledge of psychology would create the danger that these jurors "might offer informal expert opinions during voir dire" (AOB 217), or how this could substantially impair their ability to perform their duties as jurors. Similarly, Clark fails to explain how Juror CP's prior hospitalization for mental illness, as indicated on her jury questionnaire (39 CT (Jury Questionnaires) 9915), could possibly bias her in her consideration of the case or otherwise substantially impair her in the performance of her duties as a juror. (AOB 218-219.) Similarly, Juror CP's knowledge of the case was not indicative of any impairment in her ability to follow the court's instructions in determining penalty. She only indicated that she had seen on television that someone had entered a Comp USA and murdered several employees. (39 CT (Jury Questionnaires) 9917.) In the first instance, this indicated little familiarity with

the case, considering that she was incorrect regarding the number of victims. Second, she indicated that she had later heard a friend of her ex-husband who she identified as Joe Plourd, a Comp USA employee, was on television. Plourd was not a witness or victim in the case and there is no indication that she had ever discussed the case with him. Further, even if she had some knowledge of the case, guilt had already been decided before the penalty phase retrial commenced. Juror JC indicated that she was willing to follow the court's instructions regarding the factors to consider in making a penalty determination and that she considered life without parole to be an acceptable alternative to death and there was no reason not to take her at her word. (39 CT (Juror Questionnaires) 9922-9924.)

The record amply supports the trial court's conclusion that these prospective jurors were not substantially impaired in the performance of their duties as jurors. (See *People v. Jenkins*, *supra*, 22 Cal.4th at p. 987.)

XX.
THE TRIAL COURT PROPERLY DISMISSED THREE PROSPECTIVE JURORS BECAUSE THEY UNEQUIVOCALLY EXPRESSED THAT THEIR OPPOSITION TO THE DEATH PENALTY WOULD SUBSTANTIALLY IMPAIR THEIR ABILITY TO PERFORM THEIR DUTIES AS JURORS

Clark contends that the trial court improperly granted challenges for cause and dismissed three prospective jurors based on their opposition to the death penalty. (AOB 235-245.) However, the trial court's dismissal of these three prospective jurors was well-supported by the statements of the jurors during voir dire indicating that their opposition to the death penalty would substantially impair their ability to perform their duties as jurors.

As discussed in Argument XIX, *ante*,

> "'[i]n a capital case, a prospective juror may be excluded if the juror's views on capital punishment would "prevent or substantially

> impair" the performance of the juror's duties.' [Citations.] 'A prospective juror is properly excluded if he or she is unable to conscientiously consider all of the sentencing alternatives, including the death penalty where appropriate.' [Citation.]" [Citation.]

(*People v. Jenkins*, *supra*, 22 Cal.4th at p. 987.)

A prospective juror's bias against the death penalty need not be "proven with unmistakable clarity." (*People v. Haley*, *supra*, 34 Cal.4th at p. 306.) "Instead, 'it is sufficient that the trial judge is left with the definite impression that a prospective juror would be unable to faithfully and impartially apply the law in the case before the juror.' " (*Ibid.*)

"The determination of a juror's qualifications falls ' "within the wide discretion of the trial court, seldom disturbed on appeal." ' " (*People v. Haley*, *supra*, 34 Cal.4th at p. 306.) A reviewing court will uphold a trial court's determination regarding a juror's views on capital punishment and whether they would prevent or substantially impair the performance of the juror's duties so long as they are supported by substantial evidence, " ' "accepting as binding the trial court's determination as to the prospective juror's true state of mind when the prospective juror has made statements that are conflicting or ambiguous." ' " (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 987; see also *People v. Wilson*, *supra*, 36 Cal.4th at p. 324.)

Each of the three prospective jurors Clark alleges were improperly dismissed for cause based on their anti-death penalty views were examined at length by the trial court and counsel and expressed an unwillingness or inability to follow the oath and the trial court's instructions and consider the death penalty. (18 RT 3625-3635 [Juror JB], 3687-3692 [Juror CC]; 36 RT 6495-6504 [Juror DF].)

Prospective Juror JB stated to the court that, while she believed in the death penalty, "I know for a fact I could not choose to send somebody to a means to have them killed." (18 RT 3627.) When asked, "Do you have such

strong feelings against the death penalty that your own ability to return a verdict of death would be substantially impaired?" she responded, "Yes, I do." (18 RT 3628.)

The trial court granted the prosecution's challenge for cause despite Clark's opposition and dismissed prospective Juror JB, concluding that "I believe as I understood this juror's responses, she is telling the court that she has no philosophical quarrel in the abstract with the death penalty, but she personally could not impose it" and that "her answers applying the *Witt* standard convince me that she would not vote to take a human life." (18 RT 3635-3637.) Prospective Juror JB's responses during voir dire support this conclusion and the trial court correctly dismissed her from the jury. (See *People v. Haley*, *supra*, 34 Cal.4th at pp. 306-308.)

Prospective Juror CC stated that he was opposed to the death penalty, as it was "just getting even." (18 RT 3688.) When asked if "your attitude against the death penalty would impair your ability, substantially impair your ability to return a finding that [Clark] should be sentenced to death?" he responded, "Yes, I believe so." (18 RT 3689.) The trial court further inquired,

> Is it basically your statement to the court that despite the present state of the law in the state of California, and despite the sufficiency of the proof, that your own personal objection to the death penalty would make it impossible for you to consider that as a verdict you could participate it?
>
> Prospective Juror CC answered, "Yes."

(18 RT 3689.)

The prosecution challenged prospective juror CC for cause and Clark's counsel indicated "the *Witt* standard I think, my understanding, it's met," but that he was nonetheless opposing the juror's dismissal because the juror indicated a willingness to listen to the evidence. (18 RT 3692-3693.) Although Clark's counsel did not join in juror CC's dismissal, his concurrence that the

Witt standard was met is of some import. (See *People v. Schmeck* (2005) 37 Cal.4th 240, 262.)

The trial court granted the challenge and dismissed prospective Juror CC, finding that prospective Juror CC "is telling us that his objection to the death penalty is such that he couldn't impose it." (18 RT 3693.) Prospective Juror CC's inability to perform his duties as a juror and unwillingness to consider the death penalty under any circumstances was unequivocally established by his responses to the trial court's questions and the trial court correctly dismissed him from the jury. (See *People v. Haley*, *supra*, 34 Cal.4th at pp. 306-308.)

Prospective Juror DF was asked whether "you yourself do not want to accept that responsibility of ever voting to put someone to death?" and said, "I think that's fair." (36 RT 6496-6497.) When asked, "If you sit in a case, is this emotion, this personal feeling that you have, of such magnitude that you think in your mind it would impair you, it would prevent you, whatever words you want to use, from considering imposing the death penalty?" Prospective Juror DF answered, "I think it would. I think the answer is yes." (36 RT 6503.) Prospective Juror DF then described his impairment in performing his duties as a juror as "substantial." (36 RT 6503.)

The trial court granted the prosecution's challenge to Prospective Juror DF despite Clark's opposition, finding that "he has expressed such emotional dilemma concerning the death penalty and quantifies his reluctance to implement it, no matter what the evidence is, is substantially impaired, and I will excuse him." (36 RT 6504-6505.) Prospective Juror DF's inability to perform his duties as a juror and unwillingness to consider the death penalty under any circumstances was unequivocally established by his responses to the trial court's questions and the trial court correctly dismissed him from the jury. (See *People v. Haley*, *supra*, 34 Cal.4th at pp. 306-308.)

XXI.

CLARK'S EXCLUSION FROM THE IMMUNITY HEARING FOR MATTHEW WEAVER AND JEANETTE MOORE DID NOT VIOLATE HIS RIGHT TO BE PRESENT DURING CRITICAL STAGES OF THE PROCEEDINGS BECAUSE THE HEARING WAS NOT A CRITICAL STAGE

Clark contends that his federal constitutional right to be present at all critical stages of the proceedings against him was violated by his exclusion from the Penal Code section 1324 immunity hearing for prosecution witnesses Matthew Weaver and Jeanette Moore. (AOB 246-255.) Clark's claim fails because an immunity hearing under section 1324 is not a critical stage of criminal proceedings implicating a defendant's state and federal constitutional rights.

A criminal defendant enjoys the right under both the state and federal Constitutions to be personally present " ' " 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge,' " but not " 'when presence would be useless, or the benefit but a shadow.' " ' " (*People v. Roldan*, *supra*, 35 Cal.4th at pp. 717-718.) This right only attaches " 'at a "stage . . . that is critical to [the] outcome" and [where] "his presence would contribute to the fairness of the procedure." ' " (*Id.* at p. 718.)

Clark contends that the hearing at which prosecution witnesses Matthew Weaver and Jeanette Moore were granted immunity pursuant to Penal Code section1324 was such a critical stage of the proceedings and therefore implicated his right to personal presence. (AOB 246-255.) Regardless, the immunity hearing under Penal Code section 1324 was not a critical stage of the

proceedings and had no reasonably substantial relation to Clark's ability to defend the charges against him.[21/]

Although this Court has never addressed the question of whether an immunity hearing under Penal Code section 1324 is a critical stage of a criminal proceedings implicating a defendant's right to personal presence, the Courts of Appeal have addressed the issue in two cases, *People v. Randolph* (1970) 4 Cal.App.3d 655, and *People v. Boehm* (1969) 270 Cal.App.2d 13. In *Randolph*, the Court of Appeal held that a hearing under Penal Code section 1324 was not a critical stage of the proceedings requiring the defendant's presence because section 1324, on its face, does not concern any party other than the prosecutor and the witness refusing to testify. (*People v. Randolph*, *supra*, 4 Cal.App.3d at p. 660.)

In *Boehm*, another Court of Appeal held that a defendant was not prejudiced by his absence from an immunity hearing for a codefendant. (*People v. Boehm*, *supra*, 270 Cal.App.2d at pp. 19-20.) The court noted that "any possible benefit that [the defendant] might have derived by being personally present at the conference would have been 'but a shadow.'" (*Id.* at p. 20.) Contrary to Clark's assertion (AOB 249), the court in *Boehm* never expressly held that an immunity hearing was a critical stage of the proceedings, but instead decided the case based on the lack of prejudice without addressing the underlying issue. (*Id.* at pp. 19-20.) However, even if *Boehm* can be read as holding that an immunity hearing under Penal Code section 1324 is a critical

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21. The hearing was conducted outside of Clark's presence and, although there are indications on the record that the hearing was reported, a transcript of that hearing is not part of the instant record. (43 RT 7592.)

While it is error to fail to report all proceedings in a capital case as required by Penal Code section 190.9, it is not reversible error absent prejudice. It is Clark's burden to show a deficiency in the record is prejudicial to his ability to prosecute his appeal. (*People v. Huggins* (2006) 38 Cal.4th 175, 204.) There was no prejudice from any failure to report the proceedings, or the absence of any transcript, and Clark does not contend otherwise.

stage of the proceedings, the holding in *Randolph* is the better view and should be adopted by this Court.

Penal Code section 1324 provides:

> In any felony proceeding or in any investigation or proceeding before a grand jury for any felony offense if a person refuses to answer a question or produce evidence of any other kind on the ground that he or she may be incriminated thereby, and if the district attorney of the county or any other prosecuting agency in writing requests the court, in and for that county, to order that person to answer the question or produce the evidence, a judge shall set a time for hearing and order the person to appear before the court and show cause, if any, why the question should not be answered or the evidence produced, and the court shall order the question answered or the evidence produced unless it finds that to do so would be clearly contrary to the public interest, or could subject the witness to a criminal prosecution in another jurisdiction, and that person shall comply with the order. After complying, and if, but for this section, he or she would have been privileged to withhold the answer given or the evidence produced by him or her, no testimony or other information compelled under the order or any information directly or indirectly derived from the testimony or other information may be used against the witness in any criminal case. But he or she may nevertheless be prosecuted or subjected to penalty or forfeiture for any perjury, false swearing or contempt committed in answering, or failing to answer, or in producing, or failing to produce, evidence in accordance with the order. Nothing in this section shall prohibit the district attorney or any other prosecuting agency from requesting an order granting use immunity or transactional immunity to a witness compelled to give testimony or produce evidence.

As the Court of Appeal in *Randolph* correctly noted, section 1324, by its terms, involves only three parties in immunity proceedings: the court, the prosecutor, and the witness. (Pen. Code, § 1324; *People v. Randolph*, *supra*, 4 Cal.App.3d at p. 660.) The statute creates no place in the immunity proceedings for the defendant.

Indeed, this Court has noted that section 1324 vests in the prosecutor alone a "statutory right, incident to its charging authority, to grant immunity and thereby compel testimony." (*People v. Samuels* (2005) 36 Cal.4th 96, 127.)

Just as a criminal defendant has no right to compel the prosecutor to grant immunity (*Ibid.*), by parity of reasoning, a criminal defendant is without authority to challenge the prosecutor's exercise of the statutory right. Immunity decisions, like charging decisions, are an exercise of the prosecution's executive powers and, as at least one appellate court has observed, it is inappropriate for even the judiciary to "overrule" immunity decisions. (See *People v. Galante* (1983) 143 Cal.App.3d 709, 713.)

Accordingly, since Clark was without power to object to the grant of immunity to Weaver and Moore, the only role he could have played at the hearing would be as a passive observer. As his presence " ' " 'would be useless' " ' " and " ' " 'the benefit but a shadow,' "' " Clark had no right to be personally present at the immunity hearing. (See *People v. Roldan*, *supra*, 35 Cal.4th at pp. 717-718.)

This conclusion is consistent with this Court's decisions regarding a criminal defendant's constitutional right to be present at critical stages of the proceedings. This Court has held that,

> a defendant may ordinarily be excluded from conferences on questions of law, even if those questions are critical to the outcome of the case, because a defendant's presence would not contribute to the fairness of the proceedings.

(*People v. Perry* (2006) 38 Cal.4th 302, 312.) For example, a defendant may be excluded from a hearing regarding the competence of a child witness. (*Id.*, citing *Kentucky v. Stincer* (1987) 482 U.S. 730 [107 S.Ct. 2658, 96 L.Ed.2d 631].) A defendant may be excluded from a hearing on whether to remove a juror. (*People v. Perry*, *supra*, at p. 312, citing *Rushen v. Spain* (1983) 464 U.S. 114 [104 S.Ct. 453, 78 L.Ed.2d 267].) A defendant may similarly be excluded from a hearing on jury instructions and "routine procedural discussions on matters that do not affect the outcome of the trial, such as when to resume proceedings after a recess." (*People v. Perry*, *supra*, 38 Cal.4th at p.

312.) Just like these other analogous circumstances, the immunity proceedings under Penal Code section 1324 similarly involved a purely legal determination in which Clark had no role to play. His presence would have contributed nothing to the proceedings and was unnecessary.

However, even assuming Clark had a right to be present at the immunity hearing, any error was harmless.

> [E]rror pertaining to a defendant's presence is evaluated under the harmless beyond a reasonable doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 23, 87 S.Ct. 824, 17 L.Ed.2d 705.

(*People v. Davis*, *supra*, 36 Cal.4th at p. 532.)

Any error in excluding Clark from the immunity hearing was harmless beyond a reasonable doubt. As discussed above, there was no role for Clark to play at the hearing and he had no legal authority to challenge the prosecution's immunity decisions. The only thing Clark's absence deprived him of was knowledge of precisely what was said. However, at trial, both Weaver and Moore testified that they had been granted immunity by the prosecution. (43 RT 7640-7643; 45 RT 7999-8002.) Clark was afforded ample opportunity to cross-examine both witnesses regarding the grant of immunity and their previous, perjured testimony for which they had received immunity and to attack their credibility on that basis. (44 RT 7751-7816; 46 RT 8089-8169.) Clark's absence from the immunity proceedings had no affect on the outcome of the trial. (See *People v. Davis*, *supra*, 36 Cal.4th at pp. 532-533.)

XXII.

THE ADMISSION AT TRIAL OF ARDELL WILLIAMS'S GRAND JURY TESTIMONY AND INTERVIEW STATEMENTS TO POLICE DID NOT VIOLATE THE CONFRONTATION CLAUSE BECAUSE CLARK EXPRESSLY WAIVED HIS OBJECTION TO THE ADMISSION OF THE STATEMENTS FOR THEIR TRUTH

Clark contends that Ardell Williams's statements made during her grand jury testimony and interviews with police were improperly admitted under Evidence Code section 1350 at his trial in violation of the Confrontation Clause, and specifically the rule set forth by the United States Supreme Court in *Crawford v. Washington*, *supra*, 541 U.S. 36. (AOB 256-278.) Clark expressly withdrew any challenge to the jury considering Williams's statements for their truth and, by implication, he also waived any objection under the Confrontation Clause in light of the withdrawal of his hearsay objection.

A criminal defendant's federal constitutional right to confrontation is not absolute. (*Alvarado v. Superior Court* (2000) 23 Cal.4th 1121, 1138.) A defendant may waive his confrontation rights. (See *Herbert v. Superior Court* (1981) 117 Cal.App.3d 661, 667.)

> "A waiver of the right of confrontation can take various forms. In some instances, an accused may voluntarily consent to forego his right of confrontation. . . . By stipulating to the admission of evidence, the defendant waives the right to confront the source of the evidence. [Citations.]"

(See *Id.* at pp. 667-668.)

The prosecution sought to offer Williams's grand jury testimony and interview statements at trial pursuant to Evidence Code section 1350, the hearsay exception for statements of an unavailable declarant, as well as for the non-hearsay purposes of establishing motive and corpus for the murder of a witness special circumstance (Pen. Code, § 190.2, subd. (a)(10)). (5 CT

1744-1760.) Clark challenged the admission of Williams's statements to the grand jury and police for their truth on hearsay and Confrontation Clause grounds in his written opposition. (1 CT 311-343.) The trial court denied the prosecution's motion to introduce Williams's statements for their truth, finding that the requirement of trustworthiness under Evidence Code section 1350, subdivision (a)(4), was not satisfied, but permitted their admission for the non-hearsay purpose of establishing the corpus of the murder of a witness special circumstance by showing that Williams was a witness against Clark in the Comp USA case and establishing a motive for her murder. (13 RT 2600-2605.)

At a later hearing, Clark's trial counsel indicated that he would abandon his opposition to Ardell Williams's statements being offered for their truth so that he could impeach the substance of the statements. The trial court explained to Clark at length that it had ruled Ardell Williams's statements inadmissible for their truth and the effect of abandoning his objection to the admission of the statements. Clark indicated that "I understand all of it now" and expressly waived any objection to Williams's statements being offered for their truth. (14 RT 2915-2922.)

Clark's express waiver of any challenge to the admission of the statements for their truth also waived any objection under the Confrontation Clause and his claim must fail. (See *Herbert v. Superior Court*, *supra*, 117 Cal.App.3d at pp. 667-668.)

However, even assuming his confrontation objection was not waived, as discussed in Argument XVIII, *ante*, because Clark procured Williams's unavailability at trial by murdering her, the doctrine of forfeiture by wrongdoing would prevent Clark from asserting that his confrontation rights were violated. Here, the jury found Clark guilty beyond a reasonable doubt of conspiring to murder Ardell Williams, of murdering Ardell Williams, and found true the special circumstance that Williams was murdered to prevent her from testifying.

(8 CT 2777-2778, 2789.) Based on these findings, it is clear that Clark was responsible for procuring Ardell Williams's unavailability and he is equitably barred from asserting that her absence violated his confrontation rights. (See *Davis v. Washington*, *supra*, ___ U.S. ___ [___ S.Ct. ___, ___ L.Ed.2d ___], [2006 WL 1667285, *12].)

XXIII.

THE TRIAL COURT PROPERLY ADMITTED ARDELL WILLIAMS'S GRAND JURY TESTIMONY AND POLICE INTERVIEW STATEMENTS FOR THE NON-HEARSAY PURPOSE OF ESTABLISHING MOTIVE AND CORPUS OF THE MURDER OF A WITNESS SPECIAL CIRCUMSTANCE

Clark contends that the trial court improperly admitted Ardell Williams's grand jury testimony and police interview statements as non-hearsay to establish the corpus of the murder of a witness special circumstance (Pen. Code, § 190.2, subd. (a)(10)). He argues "[t]his was a thinly-veiled effort to introduce the statements for their truth." (AOB 279-288.) However, the statements were relevant and properly admitted to establish motive and the corpus of the murder of a witness special circumstance.

As discussed in Argument XXII, *ante*, Clark expressly and personally withdrew any challenge to the statements being offered for their truth. (14 RT 2915-2922.) Insofar as Clark challenges the trial court's admission of Williams's grand jury testimony and police interviews as non-hearsay (13 RT 2600-2605), his claim is without merit.

As discussed in Argument X, *ante*, only relevant evidence is admissible. (Evid. Code, § 350; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 995.) Relevant evidence is defined as,

> evidence, including evidence relevant to the credibility of a witness. . ., having any tendency in reason to prove or disprove any disputed fact

that is of consequence to the determination of the action.

(Evid. Code, § 210; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 995.)

A trial court has broad discretion to determine the relevance of evidence and its exercise of discretion "is not grounds for reversal unless ' "the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." ' [Citations.]" (*People v. Ochoa*, *supra*, 26 Cal.4th at pp. 437-438; see also *People v. Cunningham*, *supra*, 25 Cal.4th at p. 995.)

As this Court observed in *People v. Durrant* (1875) 116 Cal. 179, 207-208, "[i]n every criminal case, proof of the moving cause is permissible, and oftentimes is valuable[.]" The jury was instructed according to CALJIC No. 2.51 that it could consider the presence of motive as tending to establish guilt. (7 CT 2686.)

The prosecution contended that Clark arranged Ardell Williams's murder to prevent her from testifying against him in the Comp USA case. This was the theory of the murder of a witness special circumstance (Pen. Code, § 190.2, subd. (a)(10)).

Clark contends that the prosecution merely had to "prove that [Williams] testified before the grand jury and/or gave statements to law enforcement" and could do so without introducing the content of those statements. (AOB 281.) However, the content of the statements was critical to establish that Williams's potential testimony was so damning as to motivate Clark to have her killed to prevent her testimony from being presented at his trial. For the purpose of establishing motive, the truth of Williams's statements was irrelevant. It was only important to show that Clark knew what Williams would testify to at his trial. Whether Williams's statements were true or not, it was Clark's belief that the jury would hear and potentially believe Williams's testimony that was critical in showing his motive for arranging her murder.

Clark relies on this Court's decision in *People v. Edelbacher*, wherein the prosecution alleged pursuant to Penal Code section 190.2, subdivision (a)(10) that the defendant had murdered his wife in retaliation for her testimony against him as the victim in his spousal rape trial, in which the defendant had been acquitted. (AOB 281-282, citing *People v. Edelbacher* (1989) 47 Cal.3d 983, 1027.) Evidence of the earlier spousal rape trial and the fact that the victim had testified against the defendant was admitted at the defendant's capital murder trial to show motive. (*Ibid.*) This Court found that the evidence was properly admitted to show motive. (*Id.* at pp. 1027-1028.) In so holding, this Court noted, "No evidence regarding the circumstances of the alleged spousal rape was admitted, only the fact that the charge had been brought and tried and that defendant had been acquitted." (*Id.* at p. 1028.)

Clark's reliance on *Edelbacher* is misplaced. The situation in *Edelbacher* was fundamentally different than this case. In *Edelbacher*, the prosecution had to show that the defendant killed his wife in retaliation for her testifying against him in his previous spousal rape trial. The motive was not to avoid conviction for the spousal rape charge; indeed, that trial was complete at the time of the murder and the defendant had been acquitted. The motive instead was revenge for her taking the stand against him in the first instance. It was the act of testifying and not what she had testified to that motivated the murder in *Edelbacher*.

Here, Ardell Williams was murdered not out of revenge for her testimony, but to prevent her from testifying in the first instance. Accordingly, in order for the jury to assess the quality of Clark's motive, they would have to know what he believed Williams was going to testify to at trial. Only then could the jury assess whether her potential testimony was of sufficient gravity that it would provide Clark with a motive for murder. Accordingly, unlike *Edelbacher*, introducing the statements themselves, and not merely evidence that Williams had made statements to the grand jury and police, was critical to

establish Clark's motive and the statements were properly admitted for non-hearsay purposes. Accordingly, the trial court properly admitted Williams's statements for these highly relevant non-hearsay purposes.

XXIV.

THE TRIAL COURT PROPERLY DENIED CLARK'S MOTION TO SUPPRESS THE 6,000 LETTERS SEIZED BY ORANGE COUNTY JAIL PERSONNEL BECAUSE HE HAD NO LEGITIMATE EXPECTATION OF PRIVACY IN HIS NON-LEGAL JAIL MAIL AND, THEREFORE, THE MAIL COVER PROCEDURE DID NOT IMPLICATE HIS FOURTH AMENDMENT RIGHTS

Clark contends that the trial court improperly denied his motion to suppress the 6,000 letters seized by Orange County Jail personnel during his pretrial detention at the jail. (AOB 289-295.) Clark's claim is without merit, as he had no legitimate expectation of privacy in his non-legal jail mail and, therefore, the jail procedure of monitoring his non-legal mail did not implicate his Fourth Amendment rights.

As discussed in Argument VI, *ante*, when considering a trial court's denial of a motion to suppress evidence, a reviewing court views the record in the light most favorable to the trial court's ruling, deferring to those express or implied factual findings supported by substantial evidence, and then independently reviews the trial court's application of the law to the facts. (*People v. Davis*, *supra*, 36 Cal.4th at pp. 528-529.) Under the California Constitution, challenges to police searches and seizures are reviewed under federal constitutional standards. (*People v. Woods*, *supra*, 21 Cal.4th at p. 674.)

This Court in *People v. Davis*, *supra*, 36 Cal.4th at 524-529, applied the United States Supreme Court's rulings in *Bell v. Wolfish*, *supra*, 441 U.S. 520 [99 S.Ct. 1861, 60 L.Ed.2d 447] and *Hudson v. Palmer*, *supra*, 468 U.S. 517 [104 S.Ct. 3194, 82 L.Ed.2d 393] and held that pretrial detainees have no

expectation of privacy under the Fourth Amendment. Without an expectation of privacy, jail inmates' cells may be searched for any reason and their phone calls monitored without implicating the Fourth Amendment. (See *People v. Davis*, *supra*, 36 Cal.4th at pp. 526-528.)

Although *Davis* did not address searches of a jail inmate's mail, this Court's reasoning in *Davis* is equally applicable to searches of inmate mail. There is a long line of authority in the Courts of Appeal holding that,

> "Except where the communication is a confidential one addressed to an attorney, court or public official, a prisoner has no expectation of privacy with respect to letters posted by him. [Citations.]"

(*People v. Harris* (2000) 83 Cal.App.4th 371, 375, citing *People v. Garvey* (1979) 99 Cal.App.3d 320, 323; *People v. Phillips* (1985) 41 Cal.3d 29, 80-81; *People v. Manson* (1976) 61 Cal.App.3d 102, 152; *People v. Burns* (1987) 196 Cal.App.3d 1440, 1454.)

Here, Clark moved to suppress some 6,000 letters between Clark, Antoinette Yancey, and third-parties while Clark and Yancey were incarcerated in the Orange County Jail. (5 CT 1650-1655.) At the two-day hearing on the motion to suppress which began November 28, 1995, Investigator Grasso explained that he had requested Orange County Jail personnel implement a "mail cover"[22/] of Clark's mail on July 20, 1994, based on concerns regarding information he received about a possible escape attempt and concerns for the safety of other witnesses in the case. (7 RT 1635, 1646-1649.) On August 30, 1994, the magistrate ordered that the "mail cover" be continued. (5 CT 1961-1962.)

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22. Investigator Grasso explained that a "mail cover" is the process whereby jail staff, after routinely removing inmate mail from the envelope and inspecting it for contraband, will photocopy the contents of the mail. (7 RT 1635.)

At the conclusion of the hearing, the trial court denied the motion to suppress the letters seized as part of the jail mail procedure. (8 RT 1827-1831.) In doing so, the trial court noted that it was "persuaded that Investigator Grasso's concern for the safety of witnesses was subjectively valid, and supported by facts that he knew to be associated with his investigation in this case." (8 RT 1828.) The court also noted that,

> the jail had in place long before Investigator Grasso availed himself of the procedure a policy and procedure for a mail cover, and at perhaps not the very earliest opportunity, but very soon after it was implemented there was a decision in the District Attorney's Office to make this known to the most appropriate person in the judicial sense by taking it to the magistrate before whom the hearing was pending.

(8 RT 1828-1829.) Finally, the court noted that, based on information received from Investigator Grasso and the defense at the hearing, there were no attorney-client privileged documents among the 6,000 letters seized in the mail cover. (8 RT 1830.)

Based on these facts, the trial court was wholly justified in concluding that Clark's Fourth Amendment rights were not implicated by the mail cover procedure. As discussed in Argument I, *ante*, the United States Supreme Court has recognized public safety and institutional security as a legitimate penological interest. (*Turner v. Safley*, *supra*, 482 U.S. at p. 91.) Investigator Grasso had legitimate and well-founded concerns that Clark had communicated with Yancey from the jail to arrange Williams's murder and that he could use the jail mail system to threaten or harm other witnesses in the case. (8 RT 1828.)

Further, regardless of the legitimate penalogical interest in surveilling Clark's jail mail, he lacked any legitimate expectation of privacy in his non-legal jail mail. As Investigator Grasso testified, jail personnel opened all incoming and outgoing mail and inspected it for contraband. (7 RT 1653.) The court found this to be a well-established policy in the jail. (8 RT 1828-829.)

Further, no legal mail was intercepted in the mail cover. (8 RT 1830.) Accordingly, Clark had no expectation of privacy in his jail mail and the trial court properly denied his motion to suppress evidence. (See *People v. Harris*, *supra*, 83 Cal.App.4th at pp. 375-376.)

Moreover, even assuming the evidence obtained through the mail cover should have been suppressed, any error was harmless. The erroneous denial of a motion to suppress evidence based on a violation of a defendant's Fourth Amendment rights will not result in a reversal of the judgment where the error is shown to be harmless beyond a reasonable doubt according to the standard for federal constitutional error articulated in *Chapman v. California*, *supra*, 386 U.S. at p. 24. (*People v. Tewksbury* (1976) 15 Cal.3d 953, 972.)

Any error in denying Clark's motion to suppress evidence was manifestly harmless beyond a reasonable doubt because, as discussed in Argument XXVI, *post*, the prosecution ultimately elected not to introduce the 6,000 pages of letters between Clark and Yancey seized as part of the Orange County Jail mail cover procedure. (16 RT 3250-3252.) Accordingly, the letters could not have had any conceivable impact on the jury's verdict. Any error was harmless beyond a reasonable doubt.

XXV.

THE TRIAL COURT PROPERLY FOUND THAT JEANETTE MOORE'S TESTIMONY WAS NOT THE PRODUCT OF OUTRAGEOUS POLICE CONDUCT AND ITS ADMISSION DID NOT VIOLATE CLARK'S DUE PROCESS RIGHTS

Clark contends that Jeanette Moore's testimony should have been excluded both at the preliminary hearing and at trial because it was the product of outrageous police conduct and violated his due process rights. (AOB 296-306.) However, the trial court properly admitted Moore's testimony

because no misconduct, much less the sort of torture or police state tactics required to establish a due process violation, occurred.

As a matter of state law, a trial court's decision regarding the admission of evidence will not be disturbed on appeal absent an abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690, 717-718.) Ordinarily, issues relating to the admission of evidence do not implicate the federal Constitution, but involve the application of state law rules of evidence. (See *People v. Cudjo* (1993) 6 Cal.4th 585, 611.)

However, this Court has acknowledged that,

> in some instances, "courts analyzing claims of third party coercion have expressed some concern to assure the integrity of the judicial system" by vindicating a due process right of the defendant in this context. [Citations.] A recent decision of the Tenth Circuit Court of Appeals, for example, recognizes that the unreliability of a coerced confession of a third person is not the sole reason for its exclusion from evidence: " 'It is unthinkable that a statement obtained by torture or by other conduct belonging only in a police state should be admitted at the government's behest in order to bolster its case . . . . Yet methods offensive when used against an accused do not magically become any less so when exerted against a witness.' " (*Clanton v. Cooper* (10th Cir.1997) 129 F.3d 1147, 1158.)

(*People v. Jenkins*, *supra*, 22 Cal.4th at p. 968.)

Clark first moved to exclude Jeanette Moore's testimony at the preliminary hearing, arguing to the magistrate that Investigator Grasso falsely led Moore to believe that Clark was responsible for an attempt on her life in Arizona, thereby creating a motive for her to present damaging testimony against Clark. (1 MCCT 263-267.) The magistrate denied the motion and permitted Moore to take the oath and testify at the preliminary hearing. (I MCRT 157.) During the preliminary hearing, Clark's counsel questioned Moore at length regarding her interview in Arizona with Investigator Grasso. (II MCRT 284-288, 347-356.)

Moore explained that Investigator Grasso and the Chandler, Arizona police had told her about Clark being responsible for Ardell Williams's murder and about a home invasion incident where men entered a home in Arizona Moore had stayed in and fired guns and were heard to say, "Where is that bitch at?" Although Investigator Grasso did not expressly say that Clark was responsible for the home invasion incident or that she was the target, Moore assumed so because the person who was in the house at the time survived the incident, which Moore did not believe would have been the case had she been the person the men were looking for, and therefore she assumed that they had been looking for her. (II MCRT 349-352.)

Prior to trial, Clark again moved to exclude Jeanette Moore's testimony based on "outrageous police conduct." Clark claimed that Investigator Grasso falsely led Moore to believe that Clark was responsible for an attempt on her life, thereby creating a motive for her to present damaging testimony against Clark. (2 CT 547-558.)

At a hearing on the motion, Investigator Grasso testified that, when he first interviewed Moore in Arizona, he was aware of a home invasion incident in Arizona, in which two men went to a house where Moore had previously been staying, fired several rounds inside the house, and were heard to say, "Where's the bitch?" (13 RT 2673, 2682.) Based on the fact that Yancey had called Moore and sent her money and was therefore aware of her location in Arizona and the fact that Williams had been murdered to prevent her from testifying, Investigator Grasso was concerned that the home invasion incident could have been an attempt on her life and that she could be in danger.[23/] (13 RT 2674-2676.)

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23. Investigator Grasso had also learned from Arizona police that the person living at the house at the time of the home invasion incident indicated a belief that her ex-husband or boyfriend was responsible. (13 RT 2676-2677.)

The trial court denied Clark's motion to exclude Moore's testimony, explaining,

> The court, first of all, does not believe that there was any intentional or bad faith action by Officer Grasso in his communicating what he knew about the Chandler incident to Jeanette Moore.
>
> I am convinced that Officer Grasso entertained a very real concern for the safety of witnesses or potential witnesses in this hearing. And although the parties agree, and it would appear from the evidence that certainly there was no connection between that home invasion incident in Chandler, and [Clark], that Officer Grasso's discretion was not abused when he related that information to Ms. Moore, with his fears which he communicated to her that she might be in real danger, and this could have been an attempt against her.

(14 RT 2755-2756.)

As the trial court found, Investigator Grasso was conveying to Moore a possible danger based on information known to him at the time in a sincere effort to protect other witnesses in the case. This sort of legitimate public safety activity is precisely the sort of behavior expected of law enforcement and hardly amounts to the kind of "police state" tactics which this Court held could potentially implicate a defendant's due process rights. (See *People v. Jenkins*, *supra*, 22 Cal.4th at p. 968.)

At most, Clark contends that Moore was misled into believing that Clark could have been responsible for the home invasion incident in Arizona and that there could be further attempts on her life. Even ignoring, for the sake of argument, the trial court's conclusion that Investigator Grasso acted in good faith (14 RT 2755) and assuming that he was attempting to mislead Moore, such conduct would not render her subsequent trial testimony coerced or unreliable. Even in the context of criminal confessions, deception by police does not render a statement involuntary unless it is of the sort that is "reasonably likely to procure an untrue statement." (*People v. Farnam* (2002) 28 Cal.4th 107, 182.)

Any belief Moore may have had that she was in danger from Clark was not of the sort that would be reasonably likely to produce false testimony. Indeed, if Moore actually believed Clark meant to harm her, providing false, incriminating evidence against him would be far more likely to provoke retaliation from Clark than anything else Moore could have done. Indeed, if she truly wished to obviate any danger she perceived from Clark, she would have refused to cooperate with police, since, if she did not testify, Clark would have no reason to harm her. There is simply no evidence to support Clark's contention that she testified falsely.

Further, Investigator Grasso did not tell Moore about the home invasion incident to obtain incriminating statements from her to be used against Clark, but to secure her presence in court. Once in court, at both the preliminary hearing and at trial, she was sworn and subject to cross-examination by Clark's counsel, which the United States Supreme Court has described as the " 'greatest legal engine ever invented for the discovery of truth.' " (*California v. Green* (1970) 399 U.S. 149, 158 [90 S.Ct. 1930, 26 L.Ed.2d 489], quoting 5 Wigmore, Evid., § 1367.) Clark was then able to attack Moore's credibility and challenge the veracity of her testimony at great length. (43 RT 7723-7735; 44 RT 7751-7816.) The jury simply found his efforts at impeachment wanting.

Accordingly, since Moore's testimony was not procured through torture, tactics of a police state, or misconduct of any sort, the trial court properly rejected Clark's motion to exclude her testimony based on police misconduct. (See *People v. Jenkins*, *supra*, 22 Cal.4th at p. 968.)

XXVI.

THE TRIAL COURT DID NOT ABUSE ITS DISCRETION UNDER EVIDENCE CODE SECTION 352 IN CONCLUDING THAT THE PROBATIVE VALUE OF LETTERS SHOWING THE INTENSE NATURE OF THE RELATIONSHIP BETWEEN CLARK AND YANCEY WAS NOT SUBSTANTIALLY OUTWEIGHED BY ANY PREJUDICE ARISING FROM THE SEXUAL CONTENT OF THE LETTERS

Clark contends that the trial court improperly overruled his Evidence Code section 352 objection to the introduction at trial of certain sexually explicit letters written between Clark and Yancey. (AOB 307-311.) The trial court did not abuse its discretion under Evidence Code section 352, as the evidence was highly probative of the intense relationship between Clark and Yancey that underlay the conspiracy between the two to murder Ardell Williams and any potential prejudice was alleviated by the limiting instructions given to the jury.

Evidence Code section 352 provides that a court,

> in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Evidence will be found to be substantially more prejudicial than probative if "it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla*, *supra*, 22 Cal.4th at p. 724.) A reviewing court will only disturb a trial court's ruling under Evidence Code section 352 weighing prejudice and probative value upon a showing of an abuse of discretion. (*Ibid.*)

Clark moved to exclude the 6,000 pages of letters between Clark and co-defendant Yancey seized from Clark as part of the Orange County Jail mail cover procedure (see Argument XXIV, *ante*). Clark contended that the sexually explicit nature of the letters rendered them unduly prejudicial and subject to

exclusion pursuant to Evidence Code section 352. (5 CT 1647-1649.) Clark later expanded his Evidence Code section 352 objection to include letters seized during the search of Yancey's apartment and car. (5 CT 1997-1998.)

The prosecution elected not to introduce the 6,000 pages of letters between Clark and Yancey seized as part of the Orange County Jail mail cover procedure. (16 RT 3250-3252.) The trial court overruled Clark's Evidence Code section 352 objection to the 10 sexually explicit letters from Clark to Yancey seized from Yancey's apartment. (15 RT 3062-3064.) The trial court explained,

> The court, making a general ruling, finds that these letters are admissible. These documents are admissible. The court finds that they do have probative value, that they are not so inherently prejudicial that weighing under 352 that, except for some areas I'm going to look at more specifically, there is any reason to exclude them on that basis.
>
> Again, I believe as the People have argued, that the relationship between the alleged conspirators is always, in any conspiracy is always important, and in this case perhaps doubly so because we are talking about the association that allegedly leads one woman to kill another, to aid and assist at the behest of her lover. So certainly the relationship has probative value.
>
> I will hear, having made that general ruling, I will hear specifics on individual pages or documents. I'm going to just throw out some general comments on how I feel about the general content.
>
> Certainly the amorous portion of the letters is in some instances perhaps offensive to some people, could be. On the other hand, we are dealing with 12 adult jurors plus alternates, and I think they can accept the sexual connotations in the general correspondence.

(15 RT 3062-3063.)

The letters between Clark and Yancey that were seized during the search of Yancey's apartment were subsequently admitted into evidence at trial. (55 RT 9566-9571, 9574-9579, 9581.)

The trial court did not abuse its discretion in ruling that the letters were admissible. The trial court correctly noted that the probative value of the letters was great. The sexual content, though perhaps distasteful to some jurors, was essential to show how close Yancey was to Clark and how he utilized sexuality to manipulate her into conspiring with him to murder Williams. This could only be shown through the letters themselves. A stipulation to an "intense personal relationship" would simply not have conveyed the intensity of the relationship and the character of the interactions between Clark and Yancey and demonstrated to the jury that this relationship could form the basis for a conspiracy to murder another human being.

The trial court then expressly weighed the tremendous probative value of the evidence against the possibility of prejudice. While the court recognized that the sexual content could be distasteful to some, the court expressly found that the jurors would not be unduly influenced by the sexual content of the letters. In each instance, when the letters were presented to the jury, the court admonished the jurors that the evidence was only intended to show the relationship between Clark and Yancey, and that the letters must not be considered as showing that Clark was a person of bad character, how he treated women in general, or for any other purpose. (55 RT 9568-9569, 9574-9575, 9581.) This limiting instruction was later provided to the jury in written form as part of their packet of jury instruction in the case. (7 CT 2670.)

Accordingly, the trial court did not abuse its discretion under Evidence Code section 352 in finding that the probative value of the letters was not substantially outweighed by any possible prejudice arising from their sexual content. (See *People v. Waidla*, *supra*, 22 Cal.4th at p. 724.)

XXVII.

AN OFFER TO STIPULATE TO A CLOSE OR INTIMATE RELATIONSHIP BETWEEN CLARK AND YANCEY WOULD NOT HAVE ADEQUATELY CONVEYED THE CHARACTER OF THE RELATIONSHIP BETWEEN THE TWO AND WOULD HAVE DEPRIVED THE PROSECUTION'S EVIDENCE OF ITS FULL FORCE AND EFFECT

Clark contends that it was improper to introduce into evidence sexually explicit letters between Clark and Yancey because he was willing to stipulate to a "close relationship" between the two. (AOB 312-315.) However, no such stipulation was offered by Clark and, regardless, the prosecution could not be forced to accept such a stipulation because it would cause the prosecution's evidence to lose its full force and effect.

In *People v. Hall* (1980) 28 Cal.3d 143, 152, overruled on other grounds in *People v. Newman* (1999) 21 Cal.4th 413, 422, fn. 6, abrogated by constitutional provision on other grounds as stated in *People v. Valentine* (1986) 42 Cal.3d 170, 177-181, this Court stated that when,

> a defendant offers to admit the existence of an element of a charged offense, the prosecutor must accept that offer and refrain from introducing evidence . . . to prove that element to the jury.

(Accord, *People v. Bonin* (1989) 47 Cal.3d 808, 848-849.)

> If a fact is not genuinely disputed, evidence offered to prove that fact is irrelevant and inadmissible under Evidence Code sections 210 and 350 respectively. [Citations.]

(*People v. Hall*, *supra*, 28 Cal.3d at p. 152.)

However, "[t]he general rule is that the prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness. [Citations.]" (*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1007; accord, *People v. Sakarias* (2000) 22 Cal.4th 596, 629; *People v. Scheid* (1997) 16 Cal.4th 1, 16-17; *People v. Arias*

(1996) 13 Cal.4th 92, 131; *People v. Garceau* (1993) 6 Cal.4th 140, 182, abrogated on other grounds in *People v. Yeoman*, *supra*, 31 Cal.4th at pp. 117-118.) This includes circumstances where a defendant's offer to stipulate is "'ambiguous in form or limited in scope . . .' the evidence retains some probative value and is admissible. [Citation.]" (*People v. Hall*, *supra*, 28 Cal.3d at p. 153; see also, e.g., *People v. Bonin*, *supra*, 47 Cal.3d at p. 848 [offer to stipulate to only part of testimony properly refused]; *Old Chief v. United States* (1997) 519 U.S. 172, 186-187 [117 S.Ct. 644, 136 L.Ed.2d 574] ["a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it."].)

Although Clark characterizes his trial counsel's argument against admitting the letters as offering a stipulation to a "close relationship" between Clark and Yancey (AOB 312-315; 15 RT 3053-3061), Clark's counsel merely argued that a relationship between Clark and Yancey could be established without the letters being introduced into evidence, through the jail telephone and visitation records. This hardly amounted to a stipulation as to an element of an offense, or a stipulation as to anything at all. Indeed, a stipulated fact is one considered proven by agreement of the parties, without resort to evidence. (See CALJIC Nos. 1.00, 1.02 (April 2006 ed.).) Therefore, by arguing that a close relationship could be proven by other evidence in the case, Clark's counsel was, by implication not offering to stipulate to such a relationship.

However, even if this could be construed as an offer to stipulate to a close relationship between Clark and Yancey, the letters showed much more than a mere close or intimate relationship between the two. The prosecution's theory of the case was that Clark, who was incarcerated at the Orange County Jail, conspired with, and somehow persuaded Yancey to arrange Ardell Williams's murder. Yancey's participation in Williams's murder could not easily be explained by merely a close or intimate relationship with Clark, which Clark claims he was willing to stipulate to. It would have been improper to

compel the prosecution to accept a stipulation to a close or intimate relationship between Clark and Yancey as it would have deprived the prosecution's case and theory of motive of its "persuasiveness and forcefulness." (See *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1007.)

Instead, the prosecution could and did prove that the relationship between Clark and Yancey was not merely close and intimate. The character of this relationship was perhaps most clearly demonstrated by entries from Yancey's diary, which was also admitted into evidence at trial by stipulation of the parties. (62 RT 10557.) As an excerpt from the diary read by the prosecutor during closing argument demonstrated:

> I spoke with [Clark] tonight for the first time in months. His voice told me so much. I've learned tonight exactly how he lies. He's an artist, you know, and he's very good at deception. I love the way he lies to me. He takes me to the brink of losing control with his mannerisms and arrogance. But more than anything, the fact that I scare the hell out of - I scare the hell out of him makes my heart palpate and my panties wet. He makes me afraid of myself. I feel so many emotions when I deal with him that it gives me power. . . .

(65 RT 10872.)

The relationship between Clark and Yancey was characterized by manipulation, and sexuality was one of the tools Clark utilized in manipulating and controlling Yancey. This was demonstrated through the letters between Clark and Yancey found in Yancey's apartment and could not have been shown by a stipulation to a merely close or intimate relationship.

XXVIII.

THE TRIAL COURT PROPERLY ADMITTED THE LETTER AND NEWSPAPER CLIPPING SENT TO JEANETTE MOORE TO DISSUADE HER FROM TESTIFYING AS EVIDENCE OF CLARK'S CONSCIOUSNESS OF GUILT BECAUSE THERE WAS SUBSTANTIAL EVIDENCE TO CONNECT CLARK TO THE LETTER

Clark contends that the trial court improperly admitted a letter and newspaper article[24/] sent to Jeanette Moore in the Orange County Jail which sought to persuade her not to testify in Clark's trial because there was no evidence to connect Clark to the letter and it was therefore irrelevant to show Clark's consciousness of guilt. (AOB 316-320.) However, there was sufficient evidence presented at trial linking Clark to the letter and thereby establishing its relevance and the trial court properly exercised its discretion in admitting the letter and article.

Evidence Code section 350 provides for the admission of relevant evidence. Evidence Code section 210 defines relevant evidence as evidence "having any tendency in reason to prove or disprove a disputed fact. . . ." Evidence of a third party's efforts to threaten or dissuade a witness is relevant to show a criminal defendant's consciousness of guilt where the defendant is present during, or authorizes, the effort. (*People v. Williams* (1997) 16 Cal.4th 153, 200-201.)

Where the relevance of evidence depends on the existence of a preliminary fact, such as whether a defendant authorized a third-party's effort to dissuade a witness, the trial court must find that there is sufficient evidence for the "trier of fact to reasonably find the existence of the preliminary fact by a preponderance of the evidence." (Evid. Code, § 403, subd. (a)(1); *People v. Guerra* (2006) 37 Cal.4th 1067, 1120.) "'The court should exclude the

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24. The text of the letter and article are found at 6 CT 2242-2245.

proffered evidence only if the "showing of preliminary facts is too weak to support a favorable determination by the jury." ' " (*Ibid.*, quoting *People v. Lucas*, *supra*, 12 Cal.4th at p. 466.)

A trial court has broad discretion to determine the relevance of evidence and the sufficiency of the foundational evidence establishing that relevance and its exercise of discretion "is not grounds for reversal unless ' "the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." ' [Citations.]" (*People v. Ochoa*, *supra*, 26 Cal.4th at pp. 437-438; see also *People v. Guerra*, *supra*, 37 Cal.4th at p. 1120; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 995.)

Clark moved to exclude a letter and newspaper article sent to Jeanette Moore seeking to dissuade her from testifying at Clark's trial. Clark argued there was no evidence to connect Clark to the letter and article and, therefore, it was irrelevant, as well as unduly prejudicial under Evidence Code section 352. (7 CT 2448-2450; 38 RT 6796-6797.) The prosecution made an offer of proof that the fingerprints of Sean Birney,[25/] another inmate housed in the same module in the Orange County Jail with Clark, was found on both the envelope and letter to Jeanette Moore and the letter to Alonzo Garrett over which Clark claimed ownership after it was confiscated from Clark's cell. (38 RT 6784-6793, 6797-6802.)

The trial court accepted the prosecution's offer of proof and denied Clark's motion to exclude the letter and newspaper article, finding a "sufficient nexus" between Clark and the letter to render it relevant to show consciousness of guilt as an attempt to dissuade a witness. The trial court further concluded that the evidence was not inflammatory and that the probative value of the evidence outweighed its prejudicial effect. (38 RT 6803-6804.)

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25. Birney's name also appears later in the Reporter's Transcript with the spelling "Burney." (64 10579.)

The trial court properly exercised its discretion in finding that the letter to Jeanette Moore was relevant. At trial, the prosecution presented evidence in conformity with its earlier offer of proof that Sean Birney's fingerprints were found on the envelope and letter to Jeanette Moore and on a letter to Alonzo Garrett found in Clark's cell. (47 RT 8286-8293; 57 RT 9939-9942.) After the letter to Garrett was confiscated, Clark admitted to Deputy Desens that the letter to Garrett belonged to him and asked for its return. (57 RT 9943-9944.) Clark's acknowledgment of ownership would enable the jury to conclude that Clark had authorized the creation of the letter to dissuade Garrett, as well as the further inference that, if he had authorized Birney's efforts to dissuade Garrett, he had authorized Birney's efforts to dissuade Moore as well. The jury could conclude from this evidence that Clark was utilizing Birney to author letters to dissuade witnesses in the case from testifying at trial. This was sufficient to establish the relevance of the Jeanette Moore letter to show Clark's consciousness of guilt. (See *People v. Williams*, *supra*, 16 Cal.4th at pp. 200-201.)

However, even assuming the trial court improperly admitted the letter sent to Jeanette Moore in jail, any error was harmless. Error in the "application of ordinary rules of evidence" is reviewed under the harmless error standard articulated in *People v. Watson*, *supra*, 46 Cal.2d at 836, and will only result in reversal where it is reasonably probable that the defendant would have received a more favorable outcome had the challenged evidence not been admitted. (*People v. Harris*, *supra*, 37 Cal.4th at p. 336.) As discussed in Argument X, *ante*, there was overwhelming circumstantial evidence of Clark's guilt independent of the letter sent to Jeanette Moore and it is not reasonably probable that Clark would have obtained a more favorable outcome had the letter not been admitted into evidence.

XXIX.

THE TRIAL COURT PROPERLY RULED THAT CO-DEFENDANT ERVIN'S STATEMENTS, "OH, MY GOSH, NOT A 187, PLEASE LADY, DON'T DIE," MADE AT THE COMP USA STORE WERE ADMISSIBLE BOTH AS NON-HEARSAY EVIDENCE OF ERVIN'S STATE OF MIND AND AS SPONTANEOUS STATEMENTS UNDER EVIDENCE CODE SECTION 1240 MADE TO EXPLAIN THE SHOOTING OF KATHY LEE

Clark contends that he was prejudiced by the trial court's evidentiary ruling regarding co-defendant Nokkuwa Ervin's statements, "Oh, my gosh, not a 187, please, lady, don't die," overheard by police at the time of his arrest at the Comp USA store. Clark complains he would have offered the statement into evidence if the trial court had only ruled the statement admissible as non-hearsay circumstantial evidence of Ervin's state of mind, and not for their truth. (AOB 321-324.) However, Clark failed to challenge the trial court's ruling that the statements were admissible for their truth as spontaneous statements, forfeiting the claim on appeal. Further, the trial court properly ruled that the statements were admissible both for their truth, as spontaneous statements, and as non-hearsay.

Clark never challenged the trial court's ruling that Ervin's statements at the Comp USA store were admissible for their truth under Evidence Code section 1240 as spontaneous statements. (47 RT 8329-8335; 60 RT 10211-10219.) In fact, at the first hearing regarding the admissibility of the statements, Clark's trial counsel expressly characterized the statements as "a spontaneous declaration that shows state of mind." (47 RT 8332.) Clark's failure to make an objection forfeits the claim on appeal. (Evid. Code, § 353; see *People v. Harrison*, *supra*, 35 Cal.4th at p. 239; *People v. Szeto*, *supra*, 29 Cal.3d at p. 32.)

Clark continues to fail to challenge the admissibility of Ervin's statements under Evidence Code section 1240, instead attacking the statements

under Evidence Code section 1250, the state of mind exception to the hearsay rule, a ground on which the statement was not offered and the trial court never ruled. (AOB 321-322.)

A hearsay statement is admissible as a spontaneous statement where it "purports to narrate, describe, or explain, an act, condition, or event perceived by the declarant" and is "made spontaneously while the declarant was under the stress of excitement caused by such perception." (Evid. Code, § 1240; *People v. Morrison* (2004) 34 Cal.4th 698, 718.) A trial court "must consider each fact pattern on its own merits and is vested with reasonable discretion in the matter." (*Id.* at p. 719.) A reviewing court will uphold a trial court's factual determination that a statement qualifies as a spontaneous statement if it is supported by substantial evidence and will review the ultimate decision whether to admit the evidence for abuse of discretion. (*People v. Phillips* (2000) 22 Cal.4th 226, 236.)

Prior to Clark's cross-examination of Lieutenant Griswold, who helped Officer Rakitis arrest co-defendant Ervin at the Comp USA store and recovered the .38 revolver from his pocket, the prosecution objected to the introduction of Ervin's statements made at the scene, "Oh, my gosh, not a 187, please, lady, don't die," which Clark sought to introduce to show that Ervin did not intend to kill Kathy Lee during the Comp USA robbery,[26] as hearsay. (47 RT 8329-8330.) The trial court overruled the objection and ruled that the statements would be admissible for their truth under Evidence Code section 1240, the hearsay exception for spontaneous statements. (47 RT 8334-8335.)

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26. Clark argued that evidence of Ervin's state of mind or intent with respect to Kathy Lee's murder was relevant to show that Clark, who was prosecuted for Lee's murder as an aider and abettor in the robbery and murder under Penal Code section 190.2, subdivision (a)(17), did not act with reckless indifference to human life. (47 RT 8333-8334; Pen. Code, § 190.2, subd. (d).)

Clark did not seek to introduce Ervin's statements through Lieutenant Griswold's testimony, but later moved to introduce the statements, not for their truth, but as circumstantial evidence of Ervin's state of mind and non-hearsay. (7 CT 2579-2581.) Clark's counsel sought to limit the evidence to its non-hearsay purpose to avoid subjecting the statements to impeachment. (60 RT 10215.) The trial court ruled that the statements would be admissible both for their truth and as non-hearsay evidence of Clark's state of mind. (60 RT 10217.) Clark then elected not to present the evidence to avoid the introduction of other statements made by Ervin for impeachment. (60 RT 10218.)

The trial court properly concluded that Ervin's statements were admissible for the non-hearsay purpose of demonstrating Ervin's state of mind. (60 RT 10217; see *People v. Cox* (2003) 30 Cal.4th 916, 962-963, citing *People v. Ortiz* (1995) 38 Cal.App.4th 377, 389.) The trial court was similarly correct in concluding that Ervin's statements were also admissible as spontaneous statements under Evidence Code section 1240.

Ervin's statements, made at the scene almost immediately after the shooting of Kathy Lee, were certainly made while he was under the stress and excitement of the shooting and served to describe and explain the act of shooting Kathy Lee, which he not only perceived, but committed. By describing the event as a "187," the Penal Code section for murder, Ervin was in a very real sense explaining what had happened to Kathy Lee, who was lying on the ground bleeding nearby, and indicating his identity as the perpetrator. The trial court did not abuse its discretion in ruling that the statements would be admissible for this purpose under the hearsay exception for spontaneous statements. (See Evid. Code, § 1240; *People v. Morrison*, *supra*, 34 Cal.4th at pp. 718-719.)

However, even assuming the trial court improperly ruled that Ervin's statements were admissible under Evidence Code section 1240, any error was harmless. Error in the "application of ordinary rules of evidence" is reviewed

under the harmless error standard articulated in *People v. Watson*, *supra*, 46 Cal.2d at 836, and will only result in reversal where it is reasonably probable that the defendant would have received a more favorable outcome had the challenged evidence not been admitted. (*People v. Harris*, *supra*, 37 Cal.4th at p. 336.) There was overwhelming circumstantial evidence of Clark's culpability in the murder of Kathy Lee, and that, as required under Penal Code section 190.2, subdivision (d), Clark was a major participant in the Comp USA robbery who acted with reckless indifference to human life.

As this Court has noted,

> "reckless indifference to human life" is commonly understood to mean that the defendant was subjectively aware that his or her participation in the felony involved a grave risk of death.

(*People v. Estrada* (1995) 11 Cal.4th 568, 577.) The evidence here overwhelmingly established that Clark meticulously planned every aspect of the robbery, surveilling the target, acquiring and prepositioning the U-Haul truck, and recruiting the participants, each with a distinct and specific role to play in the commission of the crime. Not only did Clark's preparations indicate a clear purpose to succeed in the robbery, but great pains were also taken to ensure that the participants, and primarily Clark himself, would be able to escape detection and arrest afterward. This is demonstrated by the care with which Clark used Jeanette Moore and her false driver's license to obtain the U-Haul and how his brother recruited Matthew Weaver with a story about moving computers from his brother's store.

Based on Clark's meticulous planning of every aspect of the Comp USA robbery, the jury could only conclude that he was subjectively aware of how Ervin was to subdue the store employees in order to gain access to the merchandise inside, namely with the gun and handcuffs. It could not have escaped Clark's notice that such a plan would create a grave risk that someone could be harmed during the robbery's execution, whether intentionally or be

accident or misadventure. The very real possibility that someone would be harmed during the course of the robbery was simply a calculated risk that Clark was prepared to take in conceiving and executing the planned robbery. Ervin's statements would not have altered this conclusion and it is not reasonably probable that Clark would have obtained a more favorable result had the statements been admitted and limited to their non-hearsay purpose.

XXX.

THE TRIAL COURT PROPERLY DENIED CLARK'S MOTION TO SUPPRESS LIZ FONTENOT'S TAPE RECORDING OF HER CONVERSATIONS WITH CLARK BECAUSE FONTENOT WAS A PARTY TO THE CONVERSATIONS AND THEREFORE DID NOT VIOLATE THE FEDERAL WIRETAPPING STATUTE

Clark contends the trial court improperly denied his motion to suppress the tape recordings made by Ardell Williams's sister Liz Fontenot of her conversations with Clark because they were obtained in violation of the federal wiretapping statute. (AOB 325-329.) However, the trial court properly denied the motion because the federal wiretapping statute expressly allows a party to a conversation to record that conversation without the other party's knowledge or consent.

Title III of the Omnibus Crime Control and Safe Street Act of 1968 (18 U.S.C. §§ 2510-2520) "provides a 'comprehensive scheme for the regulation of wiretapping and electronic surveillance.' " (*People v. Otto* (1992) 2 Cal.4th 1088, 1097.) The federal statute provides for exclusion as a remedy to a violation of its prohibition against illegal interception of communications. (18 U.S.C. § 2515; *People v. Otto*, *supra*, at p. 1098.)

However, Title III expressly provides that it is not unlawful under the Act for a person who is a party to a communication to intercept that communication. (18 U.S.C. §§ 2511(2)(c) [party acting under color of law];

2511(2)(d) [party not acting under color of law]; *People v. Otto*, *supra*, 2 Cal.4th at p. 1097; see also *U.S. v. Shryock* (9th Cir. 2003) 342 F.3d 948, 977-978; *United States v. King* (9th Cir. 1976) 587 F.2d 956, 962.) As this Court succinctly put it, "one party may record a conversation without the knowledge or consent of the other." (*Ibid.*)

Clark, in a response to the prosecution's opposition to his motion to suppress evidence, argued that the telephone conversations between Clark and Ardell Williams's sister Liz Fontenot, recorded at Investigator Grasso's behest, should also be suppressed, contending that the recordings were made in violation of the federal wiretapping statute. (5 CT 1988-1989.)

During the hearing on the motion, Clark's counsel expanded his argument to assert alleged violations of both federal and state wiretapping statutes as a basis to exclude the tape recorded conversations.[27] (14 RT 2784.) After hearing the arguments of the parties, the trial court denied the motion on both federal and state law grounds. (14 RT 2812-2818.)

Here, as Investigator Grasso testified at the hearing on the motion to suppress the tape recordings, Liz Fontenot agreed to Investigator Grasso's request that she record her conversations with Clark. (14 RT 2788.) As a party to the conversations, Title III expressly allowed her to record the conversations, even without Clark's knowledge or consent. 18 U.S.C. §§ 2511(2)(c); 2511(2)(d); *People v. Otto*, *supra*, 2 Cal.4th at p. 1097; see also *U.S. v. Shryock*, *supra*, 342 F.3d at pp. 977-978; *United States v. King*, *supra*, 587 F.2d at p. 962.) Accordingly, the trial court properly denied Clark's motion to suppress the tape recordings made by Liz Fontenot because no violation of the federal wiretapping statute occurred.

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27. Clark's state law wiretapping claim will be addressed in Argument XXXI, *post*.

XXXI.

THE TRIAL COURT PROPERLY DENIED CLARK'S MOTION TO SUPPRESS THE TAPE RECORDED CONVERSATIONS BETWEEN HIMSELF AND ARDELL WILLIAMS'S SISTER LIZ FONTENOT BECAUSE FONTENOT RECORDED THE CONVERSATIONS AT THE DIRECTION OF INVESTIGATOR GRASSO WITHIN THE MEANING OF PENAL CODE SECTION 633

Clark contends the trial court improperly denied his motion to suppress the tape recordings made by Ardell Williams's sister Liz Fontenot of her conversations with Clark because they were obtained in violation of the California eavesdropping statute. (AOB 325-329.) However, the trial court properly denied the motion because Fontenot recorded the conversations at the direction of Investigator Grasso within the meaning of Penal Code section 633.

Penal Code section 632[28/] pertinently provides:

> (a) Every person who, intentionally and without the consent of all parties to a confidential communication, by means of any electronic

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28. Although the federal wiretapping statute discussed in Argument XXX, *ante*, makes no distinction between wiretapping and eavesdropping, referring only to the interception of communications (see 18 U.S.C. § 2511), California law treats the two acts separately.

> Penal Code section 631 prohibits "wiretapping," i.e., intercepting communications by an unauthorized connection to the transmission line. Penal Code section 632 prohibits "eavesdropping," i.e., the interception of communications by the use of equipment which is not connected to any transmission line.

(*People v. Ratekin* (1989) 212 Cal.App.3d 1165, 1168.) Although the trial court referred to the wiretapping statute, Penal Code section 631 (14 RT 2818), it appears Fontenot's use of a tape recorder to record her conversations with Clark did not involve the connection of the recording equipment to the transmission line and therefore implicated Penal Code section 632, the eavesdropping statute.

amplifying or recording device, eavesdrops upon or records the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500), or imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment. If the person has previously been convicted of a violation of this section or Section 631, 632.5, 632.6, 632.7, or 636, the person shall be punished by a fine not exceeding ten thousand dollars ($10,000), by imprisonment in the county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.

¶. . .¶

(d) Except as proof in an action or prosecution for violation of this section, no evidence obtained as a result of eavesdropping upon or recording a confidential communication in violation of this section shall be admissible in any judicial, administrative, legislative, or other proceeding.

However, Penal Code section 633 creates an exception to section 632's general prohibition on eavesdropping. Penal Code section 633 provides:

Nothing in Section 631, 632, 632.5, 632.6, or 632.7 prohibits the Attorney General, any district attorney, or any assistant, deputy, or investigator of the Attorney General or any district attorney, any officer of the California Highway Patrol, any chief of police, assistant chief of police, or police officer of a city or city and county, any sheriff, undersheriff, or deputy sheriff regularly employed and paid in that capacity by a county, police officer of the County of Los Angeles, or any person acting pursuant to the direction of one of these law enforcement officers acting within the scope of his or her authority, from overhearing or recording any communication that they could lawfully overhear or record prior to the effective date of this chapter.

Nothing in Section 631, 632, 632.5, 632.6, or 632.7 renders inadmissible any evidence obtained by the above-named persons by means of overhearing or recording any communication that they could lawfully overhear or record prior to the effective date of this chapter.

Where the admissibility of evidence depends on some preliminary factual determination, the trial court "shall determine the existence or nonexistence of the preliminary fact and shall admit or exclude the proffered evidence as required by the rule of law under which the question arises." (Evid. Code, § 405, subd. (a).) A trial court has broad discretion in determining the admissibility of evidence and a reviewing court will only disturb a trial court's exercise of that discretion upon a showing of an abuse of discretion. (*People v. Waidla*, *supra*, 22 Cal.4th at p. 717.)

As discussed in Argument XXX, *ante*, Clark, in a response to the prosecution's opposition to his motion to suppress evidence, argued that the telephone conversations between Clark and Ardell Williams's sister Liz Fontenot, recorded at the behest of Investigator Grasso, should also be suppressed, contending that the recordings were made in violation of the federal wiretapping statute. (5 CT 1988-1989.)

During the hearing on the motion, Clark's counsel expanded his argument to assert alleged violations of both federal and state wiretapping statutes as a basis to exclude the tape recorded conversations. (14 RT 2784.) With respect to Penal Code section 632, Clark's counsel argued that, in order for the law enforcement exception in section 633 to apply, the prosecution had to "show that [the recording] was done in the ordinary course of the officer's duty, and he was acting within the scope of his authority" and that, because Investigator Grasso provided Fotentot with "absolutely no guidelines, no time, no place, nothing by way of instruction" the taping exceeded the scope of his authority. (14 RT 2812-2813.)

After hearing the arguments of the parties, the trial court denied the motion on both federal and state law grounds. (14 RT 2812-2818.) The court expressly noted that it was "satisfied that a sufficient foundation has been given at this hearing, and the materials on which counsel submitted to establish the necessary foundation." (14 RT 2818.)

The trial court's conclusion that Investigator Grasso was acting within the scope of his authority as a law enforcement officer when he requested that Liz Fontenot tape record her telephone conversations with Clark is fully supported by the record. Moreover, the trial court correctly concluded that the law enforcement exception in section 633 applied. Accordingly, Penal Code section 632 was not violated.

As the Court of Appeal noted in *People v. Towery* (1985) 174 Cal.App.3d 1114, 1126, there is no case law "directly discussing the meaning of the phrase in section 633, 'pursuant to the direction of one of the above-named law enforcement officers acting within the scope of his authority.'" *Towery* involved a factual situation and legal challenge quite similar to those in the instant case. In *Towery*, a police officer investigating a conspiracy to steal and resell oil from a number of petroleum refineries directed an informant to record all telephone calls he received at his home regarding the stolen oil. (*Id.* at p. 1127.) The officer provided the informant with tapes for the recording, but the informant utilized his own tape recording equipment and police were not present when the recordings were made. (*Ibid.*)

The defendant argued that the lack of police supervision in making the recordings rendered the exception in Penal Code section 633 inapplicable because the tapes could have been altered or conversations selectively recorded. (*Ibid.*) The Court of Appeal rejected this argument, finding that "the looseness of law enforcement direction to [the informant] in making the tape recordings properly goes to the weight given to those recordings and not their initial admissibility." (*Id.* at p. 1129.)

The directions provided by Investigator Grasso to Liz Fontenot in tape recording her conversations with Clark were even more specific than those received by the informant in *Towery*. At the hearing on Clark's motion, Investigator Grasso testified that he gave the recording device to Fontenot and asked her to record "any" conversation she had with Clark. (14 RT 2788.) Far

from giving Fontenot "unfettered discretion," as Clark's counsel argued at trial (14 RT 2813), Investigator Grasso's instructions were actually quite narrow and specific. Fontenot was to record any conversation she had, regardless of the topic discussed, with a single individual, Clark, who was a suspect in the Comp USA case, which Investigator Grasso was investigating in his official capacity as a law enforcement officer. The recording was limited in scope to a single target and Fontenot had no discretion to select which conversations she would record and which conversations she would not, instead being instructed to record all of them. Further, any ambiguities in these directions would go to the weight of the tape recorded evidence, and not its admissibility. Accordingly, the trial court properly found that the law enforcement exception under Penal Code section 633 applied and the tape recordings of the conversations between Clark and Fontenot were properly admitted. (*Ibid.*)

However, even assuming the trial court improperly admitted the tape recordings, any error was harmless. Evidence admitted in violation of Penal Code section 632 will not result in the reversal of the judgement where it is not reasonably probable that the defendant would have received a more favorable result had the evidence not been admitted. (*People v. Ratekin*, *supra*, 212 Cal.App.3d at pp. 1169-1170, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) As discussed previously, there was overwhelming circumstantial evidence of Clark's guilt independent of the tape recorded conversations between Clark and Fontenot. Further, although Clark told Fontenot that he was concerned that the authorities were trying to link him to a crime in Orange County and that he believed Williams was cooperating with the police (14 CT 5346-5408), there was ample evidence, independent of these conversations, of Clark's motive to murder Williams. This evidence included Williams's grand jury testimony and Clark's statements to Alonzo Garrett that Williams "could put me away." (56 RT 9715.) Accordingly, any error in admitting the tape recorded conversations between Clark and Fontenot was harmless.

XXXII.

THE TRIAL COURT PROPERLY ADMITTED SPECIAL AGENT TODD HOLLIDAY'S TESTIMONY REGARDING STATEMENTS MADE TO HIM BY ARDELL WILLIAMS REGARDING HER CONVERSATIONS WITH ERIC CLARK ABOUT THE COMP USA ROBBERY AND MURDER BECAUSE THE STATEMENTS DID NOT VIOLATE THE GENERAL PROHIBITION AGAINST HEARSAY OR THE CONFRONTATION CLAUSE

Clark contends that the trial court improperly admitted double hearsay, in the form of statements made by Eric Clark to Ardell Williams, which Williams in turn related to FBI Special Agent Todd Holliday.[29/] He claims this violated both state law and his rights under the Confrontation Clause. (AOB 338-343.) Clark waived his hearsay and confrontation challenges to Special Agent Holliday's testimony by failing to object at trial and, regardless, the evidence was properly admitted under state and federal law.

First, Clark did not make a hearsay objection in the trial court to Clark's or Williams's statements as presented through the testimony of Special Agent Holliday. (52 RT 9204.) Clark's failure to make an objection forfeits the claim on appeal. (Evid. Code, § 353; see *People v. Harrison*, *supra*, 35 Cal.4th at p. 239; *People v. Szeto*, *supra*, 29 Cal.3d at p. 32.)

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29. Clark contends that his general in limine challenge to the admissibility of Ardell Williams's statements under Evidence Code section 1350 was sufficient to preserve the issue for appeal. (AOB 338; 9 RT 1901-1950; 12 RT 2548-2594; 15 RT 2954-2970.) However, Evidence Code section 353, subdivision (a) requires a timely and specific objection to the proffered evidence, which did not occur in this case with respect to the specific testimony of Special Agent Holliday now challenged on appeal. Indeed, as was discussed in Argument XXII, *ante*, Clark expressly and personally withdrew a hearsay challenge to Williams's statements. (14 RT 2915-2922.)

However, even assuming Clark's claim were properly before this Court, it is without merit. FBI Special Agent Todd Holliday was called as a witness by the prosecution to discuss statements made to him by Ardell Williams regarding Clark and the Comp USA robbery and murder case. (52 RT 9083-9111, 9126-9128.) When asked about the substance of a December 31, 1991 phone call with Williams, Special Agent Holliday explained,

> She basically - there were two areas that were discussed. The first area concerned statements that Eric Clark had made to her, and the second concerned a drive she had taken with [Clark].
>
> The first thing she said that Eric Clark had told her, discussed with her how he and [Clark] had been involved in a robbery of a Comp U.S.A. in Fountain Valley.
>
> And from what he said to her, it sounded - she believed from what he said that Eric Clark and [Clark] had set the robbery up, that they had planned the robbery.
>
> Eric Clark told her that the - that there had been two robbers, that they had the people tied up, that something went wrong and a lady was killed. Eric Clark said that one of the robbers had shot this lady. But there weren't supposed to be bullets in the gun.
>
> Eric Clark also told her that [Clark's] B.M.W. had been seen. And I don't recall whether she said that Eric Clark told her that they had sold the B.M.W. or they were trying to sell the B.M.W.

(52 RT 9104.)

First, with respect to the statements of Eric Clark conveyed to Special Agent Holliday by Ardell Williams, as discussed at length in Argument XI, *ante*, Eric Clark's statements were admissible both as non-hearsay evidence of a conspiracy to rob the Comp USA store and under Evidence Code section 1223 as statements of a conspirator.[30/] (See *People v. Noguera*, *supra*, 4 Cal.4th

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30. Clark also contends that Special Agent Holliday's testimony should have been excluded under Evidence Code section 352. (AOB 340-342.) However, his failure to object on Evidence Code section 352 grounds (52 RT

at pp. 624-625 [statements admissible as non-hearsay]; *People v. Hardy*, *supra*, 2 Cal.4th at p. 139 [statements admissible under Evidence Code section 1223 as statements of a co-conspirator].)

Similarly, as discussed in Argument XXII, *ante*, Clark expressly and personally withdrew any challenge to the statements of Ardell Williams being offered for their truth (14 RT 2915-2922), and, as discussed in Argument XXIII, *ante*, those statements were also properly admitted as non-hearsay evidence of the conspiracy to rob the Comp USA. Consequently, admission of the statements was wholly consonant with California law.

Clark's claim that admission of the statements violated the Confrontation Clause fares no better. Again, as discussed in Argument XVII, *ante*, Clark failed to object under the Confrontation Clause at trial, thereby forfeiting the claim on appeal. Failure to assert the Confrontation Clause as grounds for challenging an evidentiary ruling in the trial court forfeits the issue on appeal. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 869; but see *People v. Johnson*, *supra*, 121 Cal.App.4th at p. 1411, fn. 2 [Confrontation Clause objection not forfeited where trial occurred before decision in *Crawford*].)[31] Accordingly, Clark forfeited a Confrontation Clause challenge to the evidence based on his lack of objection.

Even assuming Clark's confrontation challenges were properly raised in this court, they are without merit. As discussed in Argument XVII, *ante*, the high court held that non-testimonial hearsay, a category in which the court

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9204) forfeits the claim on appeal. (*People v. Ghent* (1987) 43 Cal.3d 739, 766; see also Evid. Code, § 353.)

31. As noted in Argument XVII, herein, this Court has twice declined to decide whether a defendant tried before *Crawford* was decided forfeits an appellate challenge to the admission of testimonial evidence in violation of the Confrontation Clause within the meaning of *Crawford*. (See *People v. Harrison*, *supra*, 35 Cal.4th at p. 239; *People v. Monterroso*, *supra*, 34 Cal.4th at p. 763.)

expressly included statements in furtherance of a conspiracy, do not implicate the Confrontation Clause. (*People v. Mitchell*, *supra*, 131 Cal.App.4th at pp. 1221-1222, citing *Crawford v. Washington*, *supra*, 541 U.S. at p. 56, fn. omitted.) Accordingly, the admission at trial of Eric Clark's statements to Ardell Williams regarding the conspiracy to rob the Comp USA store were non-testimonial and were therefore not barred by the Confrontation Clause.

As discussed in Argument XVIII, *ante*, because Clark procured Williams's unavailability at trial by murdering her, the doctrine of forfeiture by wrongdoing would prevent Clark from asserting that his confrontation rights were violated. Here, the jury found Clark guilty beyond a reasonable doubt of conspiring to murder Ardell Williams, of murdering Ardell Williams, and found true the special circumstance that Williams was murdered to prevent her from testifying. (8 CT 2777-2778, 2789.) Based on these findings, it is clear that Clark was responsible for procuring Ardell Williams's unavailability and he is equitably barred from asserting that her absence violated his confrontation rights. (See *Davis v. Washington*, *supra*, ___ U.S. ___ [___ S.Ct. ___, ___ L.Ed.2d ___][2006 WL 1667285, *12].)

XXXIII.

FBI SPECIAL AGENT TODD HOLLIDAY'S TESTIMONY SHOULD NOT HAVE BEEN STRICKEN UNDER EVIDENCE CODE SECTION 771 BASED ON HIS REFUSAL TO SURRENDER HIS NOTES TO THE DEFENSE BECAUSE THE NOTES WERE IN THE CONTROL OF THE FBI AND CLARK FAILED TO FOLLOW ESTABLISHED FBI PROCEDURES IN SEEKING THEIR RELEASE

Clark contends that the trial court should have stricken the testimony of FBI Special Agent Todd Holliday under Evidence Code section 771 based on his refusal to surrender notes that he referred to during his testimony to Clark for inspection. (AOB 344-349.) In the first instance, Clark has forfeited this

claim by failing to object and move to strike his testimony in the trial court. However, regardless, Special Agent Holliday's testimony was not subject to being stricken under Evidence Code section 771 because the notes, while in his possession, were in the control of the FBI and Clark failed to comply with established FBI procedures required for their release.

Initially, Clark has forfeited any claim that Special Agent Holliday's testimony should have been stricken under Evidence Code section 771 based on the FBI's refusal to permit the production of his notes which he used to refresh his recollection at trial.[32/] This Court has "long held that a party who does not object to a ruling generally forfeits the right to complain of that ruling on appeal." (*People v. Seijas* (2005) 36 Cal.4th 291, 301; see also Evid. Code, § 353.) Although Clark, during cross-examination of Special Agent Holliday, asked the agent to produce the notes he was referring to while on the stand, Clark made no objection or request to strike Special Agent Holliday's testimony when he explained that the FBI forbid him from producing the notes. (52 RT 9134, 9181-9185.) Accordingly, Clark forfeited any challenge regarding

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32. Similarly, Clark's claim that his right to confrontation was violated is not properly before this Court. Clark, by failing to object in the trial court that the FBI's refusal to turn over Special Agent Holliday's notes, which he referred to when testifying at trial, violated his Sixth Amendment right to confrontation, has forfeited any challenge under the Confrontation Clause. (*People v. Kaurish* (1990) 52 Cal.3d 648, 687-688.) Further, "'a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination[.]'" (*Delaware v. Van Arsdall* (1986) 475 U.S. 673, 680, 106 S.Ct. 1431, 89 L.Ed.2d 674, quoting *Davis v. Alaska* (1974) 415 U.S. 308, 318, 94 S.Ct. 1105, 39 L.Ed.2d 347.) As discussed above, Clark was free to make an appropriate request to the FBI for the release of the notes, even at the time of the cross-examination, but chose not to do so. (52 RT 9182.) Clark was not prohibited from obtaining the notes and cross-examining Special Agent Holliday regarding them.

Special Agent Holliday's use of notes at trial. (*See People v. Seijas*, *supra*, 36 Cal.4th at p. 301; see also Evid. Code, § 353.)

However, even assuming the claim were properly preserved for appellate review, it is without merit.

Evidence Code section 771 pertinently provides:

> (a) Subject to subdivision (c), if a witness, either while testifying or prior thereto, uses a writing to refresh his memory with respect to any matter about which he testifies, such writing must be produced at the hearing at the request of an adverse party and, unless the writing is so produced, the testimony of the witness concerning such matter shall be stricken.
>
> ¶ . . .¶
>
> (c) Production of the writing is excused, and the testimony of the witness shall not be stricken, if the writing:
>
> (1) Is not in the possession or control of the witness or the party who produced his testimony concerning the matter; and
>
> (2) Was not reasonably procurable by such party through the use of the court's process or other available means.

Although Special Agent Holliday had the notes Clark's counsel sought to review in his possession and, in fact referred to them while testifying, they were not in his control, but were under the control of the Federal Bureau of Investigation, which had strict policies and procedures regarding their release which Clark's counsel had not complied with. (52 RT 9181-9182.) Further, when Special Agent Holliday indicated that "I could probably make a call and then give them to you, show them to you. I'd be happy to do that," Clark's counsel did not respond or make any effort to otherwise comply with FBI procedures for the release of the notes. (52 RT 9182.) Accordingly, production of the notes was excused under Evidence Code section 771, subdivision (c), and it was unnecessary to strike Special Agent Holliday's testimony.

This Court rejected a similar claim in *People v. Parham* (1963) 60 Cal.2d 378. In *Parham*, the defendant contended that it was error to allow certain prosecution witnesses to testify against him in a bank robbery case

where they had provided signed statements to the FBI and the FBI refused to provide those prior statements to the defense for inspection in the state trial. (*Id.* at pp. 381-382.) This Court rejected the defendant's argument, recognizing that Order No. 3229 of the Attorney General of the United States prohibited the FBI agent in the case from producing the statements without complying with the procedure set forth in the order and that the state court was bound by the order and the procedure it established.[33] (*Id.* at p. 381.) Further, use of the witnesses' testimony in the state case was appropriate because state officials had no role in denying access to the statements. (*Id.* at p. 382.)

Just like the FBI agent in *Parham*, Special Agent Holliday was precluded from relinquishing his notes to Clark for inspection without first complying with FBI procedures. When he offered to contact his superiors and attempt to facilitate the release of the documents, Clark's counsel merely moved on in his cross-examination. (52 RT 9182.) Further, the prosecution had no role in keeping Special Agent Holliday's notes from Clark. Accordingly, Evidence Code section 771, subdivision (c), served to excuse the FBI's refusal to produce the notes.

However, even assuming that the trial court should have stricken Special Agent Holliday's testimony under Evidence Code section 771 based on the FBI's refusal to produce his notes, any error was harmless. Error in the application of Evidence Code section 771 is one of state law and is reviewed under the standard set forth in *People v. Watson*, *supra*, 46 Cal.2d at 836. (See *People v. Kaurish*, *supra*, 52 Cal.3d at p. 687.) Such error will only result in

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33. Although Special Agent Holliday never expressly invoked Order No. 3229 as the basis for refusing to provide the notes, the FBI policy he referred to relating to a procedure for federal agency approval of the disclosure of the notes appears substantially similar in character to that found by this Court to be proper and binding on the state courts in *Parham*.

reversal where it is reasonably probable that the defendant would have obtained a more favorable result had the challenged testimony been stricken. (See *Ibid.*)

Special Agent Holliday was an important, but by no means essential, witness in the prosecution's case. Although he did provide an explanation as to how Ardell Williams came to the attention of Investigator Grasso and the authorities in Fountain Valley, this evidence was also largely adduced through Investigator Grasso's testimony. Further, the statements made to Special Agent Holliday by Williams about Clark's involvement in the Comp USA case were consistent with Williams grand jury testimony and statements to local authorities, all of which were introduced at trial. Finally, as discussed previously, the circumstantial evidence of Clark's guilt was overwhelming. Accordingly, it is not reasonably probable that Clark would have obtained a more favorable result had Special Agent Holliday's testimony been stricken and any error was harmless. (See *People v. Kaurish, supra*, at p. 687.)

XXXIV.

THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF THIRD-PARTY CULPABILITY IN THE MURDER OF ARDELL WILLIAMS BECAUSE THERE WAS NO EVIDENCE LINKING TONY MILLS, THE FATHER OF WILLIAMS'S CHILD, TO HER MURDER

Clark contends that the trial court improperly excluded evidence of third-party culpability, claiming that he should have been allowed to present evidence that Tony Mills, the father of Ardell Williams's child, was involved in a custody dispute with Williams and had been involved in a confrontation with her two months prior to her murder, thereby suggesting that he could have murdered Williams. (AOB 350-367.) The trial court properly excluded the proffered evidence because there was no direct or circumstantial evidence linking Mills to Williams's murder and the evidence was therefore irrelevant to demonstrate third-party culpability.

Evidence Code section 350 provides for the admission of relevant evidence. Evidence Code section 210 defines relevant evidence as evidence "having any tendency in reason to prove or disprove a disputed fact. . . ." Evidence of third party culpability, like any other type of evidence, is only admissible when that evidence is demonstrated to be relevant, subject to the strictures of Evidence Code section 352. (*People v. Hall* (1986) 41 Cal.3d 826, 834.) In order to be relevant,

> third-party evidence need not show "substantial proof of a probability" that the third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. As this court observed in *Mendez*, evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime.

(*Id.* at p. 833.)

Further, under Evidence Code section 352, even relevant evidence of third party culpability may be excluded where "its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion (§ 352)." (*Ibid.*)

A trial court has broad discretion to determine the relevance of evidence and the sufficiency of the foundational evidence establishing that relevance and its exercise of discretion "is not grounds for reversal unless ' "the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." ' [Citations.]" (*People v. Ochoa*, *supra*, 26 Cal.4th at pp. 437-438; see also *People v. Guerra*, *supra*, 37 Cal.4th at p. 1120; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 995.) Similarly, a decision to exclude evidence under Evidence Code section 352 comes within the trial court's broad discretionary powers and "will not be overturned absent an abuse of that discretion." (*People v. Minifie* (1996) 13 Cal.4th 1055, 1070.)

Here, the prosecution filed an in limine motion objecting to evidence of third party culpability. (6 CT 2337-2339.) The court held a hearing on the motion, where Clark sought to introduce evidence that Tony Mills, the father of Ardell Williams's child, was involved in a custody dispute with Williams and had been involved in a confrontation with her two months prior to her murder. (38 RT 6746-6776, 61 RT 10355-10366.) The court excluded the evidence, explaining, the jury was already aware the two were split-up and in a custody dispute. Mills took it upon himself to inform Disneyland that Williams was stealing from them and trying to pass credit cards illegally. The jury further knew that this act of Mills resulted in her being fired from Disneyland. Accordingly, the animosity between Williams and Mills was already known to the jury. The jury knew of the home invasion robbery. No evidence linked or related the home invasion robbery to Mills. The only evidence of third-party culpability relating to Mills not known to the jury and proffered by the defense was a face-to-face confrontation between Mills and Williams two months before her death. The trial court found the evidence of third-party culpability insufficient, and that it would also be excluded because the probative value was outweighed by the confusion of interjecting the domestic dispute between Williams and Mills into the criminal case. (61 RT 10364-10366.)

Clark's counsel did not challenge the trial court's summary of Clark's offer of proof. There was absolutely no evidence presented linking Tony Mills to Ardell Williams's murder. Although Mills certainly had animosity toward Williams, as demonstrated by his efforts to have her fired from her job with Disney, mere motive or opportunity to commit the crime, without more, is not sufficient to raise a reasonable doubt about a defendant's guilt, and need not be admitted into evidence. (*People v. Avila* (2006) 38 Cal.4th 491, 578; *People v. Hall*, *supra*, 41 Cal.3d at p. 833.) This Court does not require trial courts to admit evidence, however remote, to show third-party culpability. (*People v. Harris*, *supra*, 37 Cal.4th at p. 340.)

There was absolutely no evidence that Mills was involved in, or connected to, Yancey's plot to lure Williams to the Continental Receiving facility on March 13, 1994. The fact (if true) that Mills had been involved in a confrontation with Williams two months prior to the murder did no more than suggest that Mills might have had a motive to harm Williams, but that evidence was otherwise simply too remote and unconnected to the actual murder to have any relevance. Further, as the trial court recognized, there was a substantial danger that the irrelevant evidence regarding Mills would confuse or mislead the jury. Accordingly, the trial court properly excluded the proffered evidence. (See *People v. Hall*, *supra*, 41 Cal.3d at p. 833; see also *People v. Gutierrez* (2002) 28 Cal.4th 1083, 1134-1138; *People v. Kaurish*, *supra*, 52 Cal.3d at pp. 684-686.)

Clark's claim that the exclusion of third-party culpability evidence violated his federal constitutional right to present a defense similarly fails. This Court in *Hall* reaffirmed the general principle that "the ordinary rules of evidence do not impermissibly infringe on the accused's right to present a defense" and rejected a claim that the exclusion of evidence of third-party culpability implicates the federal Constitution. (*People v. Hall*, *supra*, 41 Cal.3d at p. 834.) Clark's identical claim that his federal constitutional rights were implicated by the trial court's evidentiary ruling similarly fails. (See *Ibid.*)

Even assuming arguendo the trial court improperly excluded evidence of third-party culpability, any error was harmless. Where a trial court improperly excludes evidence of third-party culpability, the error will only result in reversal of the judgment where it is reasonably probable that the defendant would have obtained a more favorable result had the evidence been admitted. (See *Id.* at pp. 835-836, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 837.) Here, as discussed previously, there was overwhelming circumstantial evidence that Clark conspired with Antoinette Yancey to plan and execute an elaborate plot to lure Williams to a bogus job interview and murder her.

Conversely, there was absolutely no evidence, beyond a suggested motive based on the custody dispute between Mills and Williams, linking Mills to Williams's murder. Accordingly, it is not reasonably probable that Clark would have obtained a more favorable verdict had the evidence regarding Mills been admitted and any error was harmless. (See *People v. Hall*, *supra*, 41 Cal.3d at pp. 835-836.)

XXXV.

THE GRANTS OF IMMUNITY PROVIDED TO MATTHEW WEAVER AND JEANETTE MOORE WERE NOT COERCIVE AND DID NOT REQUIRE THEM TO TESTIFY IN A PARTICULAR FASHION

Clark contends that it was improper to permit the testimony of Jeanette Moore and Matthew Weaver because that testimony was the product of police inducements and coercion and therefore unreliable. (AOB 368-381.) Clark has forfeited this claim by failing to object in the trial court. Further, the record demonstrates that the grants of immunity provided to Weaver and Moore were not coercive and did not require them to testify in a particular fashion, beyond merely requiring them to tell the truth.

As a preliminary matter, although Clark claims that he "repeatedly" objected to the admissibility of Moore and Weaver's testimony as being unreliable and the product of compulsion (AOB 368, citing 2 RT 834, 7 RT 1756-1760, 9 RT 1968), the record does not support this contention. A criminal defendant who fails to object in the trial court to the use of accomplice testimony based on improper police conduct in obtaining the witness's cooperation forfeits the claim on appeal. (See e.g. *People v. Avila*, *supra*, 38 Cal.4th at p. 594; see also Evid. Code, § 353.) Accordingly, Clark's failure to object on the grounds he now asserts forfeits the claim.

However, even assuming the claim were properly before this Court, it is without merit. This Court has "rejected the contention that the testimony of an immunized accomplice necessarily is unreliable and subject to exclusion. [Citations.]" (*People v. Jenkins*, *supra*, 22 Cal.4th at p. 1010.) Instead,

> [i]mmunity or plea agreements may not properly place the accomplice under a strong compulsion to testify in a particular manner - a requirement that he or she testify in conformity with an earlier statement to the police, for example, or that the testimony result in defendant's conviction, would place the witness under compulsion inconsistent with the defendant's right to fair trial. [Citation.] Although we have recognized that there is some compulsion inherent in any plea agreement or grant of immunity, we have concluded that "it is clear that an agreement requiring only that the witness testify fully and truthfully is valid." [Citations.] Such a plea agreement, even if it is clear the prosecutor believes the witness's prior statement to the police is the truth, and deviation from that statement in testimony may result in the withdrawal of the plea offer, does not place such compulsion upon the witness as to violate the defendant's right to a fair trial. [Citation.] In addition, the testimony of persons who may be subject to prosecution as accessories unless they "cooperate" with the police is not inadmissible as coerced unless something more than the threat of prosecution is shown. [Citation.]

(*People v. Jenkins, supra,* at p. 1010.)

A reviewing court must consider the entire record and exercise its independent judgment as to whether the agreement under which a witness testified was coercive, resolving factual conflicts in favor of the judgment. (*Id.* at p. 1011.) The record here demonstrates that, while the prosecution granted immunity to both Jeanette Moore and Matthew Weaver in order to secure their testimony, the grants of immunity were not coercive and did not require them to testify in a particular fashion, beyond merely requiring them to tell the truth.

When questioned about their grants of immunity, both Moore and Weaver indicated their understanding that they understood that their grant of immunity was not conditioned on testifying in a particular fashion. The prosecutor asked Moore if she understood that she was "not required to testify

the same way [she] told [sic] the police" or "he same way that [she] previously testified?" and she indicated that she did. (43 RT 7642-7643.) Similarly, the prosecutor expressly asked Weaver, "Do you understand that you're not, as you testify here today, you're not confined to a particular story?" and Weaver said, "Yes." (45 RT 8001.) The prosecutor then reiterated, "[d]o you understand that the testimony that you're going to give today, you're not required to give it in any kind of conformity to previous statements that you've given?" and Weaver again responded affirmatively. (45 RT 8002.)

Based on this evidence, both Moore and Weaver understood that their grant of immunity was not conditioned on testifying in a particular fashion and that they were not bound to testify in conformity with their prior statements. The trial court properly admitted the testimony. (See *People v. Jenkins*, *supra*, 22 Cal.4th at p. 1010.)

Finally, the trial court's instructions to the jury included the standard pattern jury instructions on accomplices and accomplice testimony. (7 CT 2700-2706.) These instructions included CALJIC Nos. 3.19, 3.11, and 3.18, informing the jury of the necessity of determining whether Moore and Weaver were accomplices, the requirement that accomplice testimony be corroborated, and the need to view accomplice testimony with distrust. The jury was also aware of the immunity agreements and could judge the witnesses' credibility accordingly. There was no error.

XXXVI.

THE TRIAL COURT PROPERLY ADMITTED TAPE RECORDINGS OF MATTHEW WEAVER'S INTERVIEWS WITH INVESTIGATOR GRASSO UNDER EVIDENCE CODE SECTION 356 BECAUSE CLARK'S COUNSEL REPEATEDLY QUESTIONED WEAVER ABOUT STATEMENTS MADE DURING THE INTERVIEWS ON CROSS-EXAMINATION AND THE PROSECUTION WAS ENTITLED TO HAVE THE JURY HEAR THE ENTIRE INTERVIEWS TO DISPEL THE IMPRESSION THAT INVESTIGATOR GRASSO WAS FEEDING INFORMATION TO WEAVER DURING THE INTERVIEWS

Clark contends that the trial court improperly admitted the tape recordings of Matthew Weaver's interviews with Investigator Grasso as evidence because he only used the transcripts of the interviews to refresh his recollection during cross-examination and did not offer any part of the transcripts into evidence.[34/] (AOB 382-394.) The trial court properly admitted the tape recordings under Evidence Code section 356 because Clark's counsel repeatedly questioned Weaver about statements made during the interviews on cross-examination and the prosecution was entitled to have the jury hear the entire interviews to dispel the misconception that Investigator Grasso was feeding information to Weaver during the interviews.

Evidence Code section 356 provides:

> Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired

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34. Clark also contends that admission of the tape recorded interviews violated his confrontation rights under *Crawford*. As discussed in Argument XVII, *ante*, Clark forfeited any objection on Confrontation Clause grounds by failing to object under the Confrontation Clause to the admission of the tape recordings at trial. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 869; but see *People v. Johnson*, *supra*, 121 Cal.App.4th at p. 1411, fn. 2 [Confrontation Clause objection not forfeited where trial occurred before decision in *Crawford*].)

> into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence.

"The purpose of this section is to prevent the use of selected aspects of a conversation, act, declaration, or writing, so as to create a misleading impression on the subjects addressed." (*People v. Arias*, *supra*, 13 Cal.4th at p. 156.)

> " 'In applying Evidence Code section 356 the courts do not draw narrow lines around the exact subject of inquiry. "In the event a statement admitted in evidence constitutes part of a conversation or correspondence, the opponent is entitled to have placed in evidence all that was said or written by or to the declarant in the course of such conversation or correspondence, provided the other statements have some bearing upon, or connection with, the admission or declaration in evidence. . . ." [Citation.]' "

(*People v. Harris*, *supra*, 37 Cal.4th at pp. 334-335, original italics, quoting *People v. Zapien* (1993) 4 Cal.4th 929, 959.)

A trial court's decision regarding the admission of evidence will not be disturbed on appeal absent an abuse of discretion. (*People v. Waidla*, *supra*, 22 Cal.4th at pp. 717-718.)

After Clark cross-examined Matthew Weaver at some length regarding his various interviews with Investigator Grasso (46 RT 8102-8104, 8114-8116, 8118-8121, 8123-8130, 8137, 8146-8158), the prosecutor sought to introduce the tape recordings of the interviews in their entirety pursuant to Evidence Code section 356, arguing that it was necessary for the jury to hear the interviews in order to combat the misleading impression Clark's counsel had created during his cross-examination of Weaver that Investigator Grasso "spoon-fed" details to Weaver during the interviews. (48 RT 8439-8442.) The trial court, after reviewing the transcript of Weaver's direct and cross-examination testimony, admitted the evidence and the tapes were later played for the jury. (48 RT 8444-8445; 49 RT 8697-8699; 50 RT 8705-8707.)

Admission of Weaver's tape recorded interviews with police was proper under Evidence Code section 356. Although Clark claims that it was improper to play the tape recorded interviews to the jury, he instead focuses on the transcripts of the interviews. He is correct that he only used the transcripts to refresh Weaver's recollection on cross-examination and did not place any portion of the transcripts in evidence. (AOB 386-389.) The transcripts were, in fact, never offered into evidence. (7 CT 2574.)

However, Clark ignores that Evidence Code section 356 expressly applies to conversations, as well as writings. (Evid. Code, § 356.) It was not Clark's counsel's use of the transcripts of the interviews to refresh Weaver's recollection that justified the admission of the entire tape recorded conversations under Evidence Code section 356, but his repeated references in his cross-examination to selected portions of those conversations. The trial court recognized this, explaining,

> The court does not believe in all candor, [Clark's counsel], that your position is borne out by the record. . . .
>
> ¶. . .¶
>
> It just goes on and on, where I will certainly agree, [Clark's counsel], that once in a while you showed him the transcript and said does that refresh your memory, but there are many references to the conversation where it was far more, far more than that.

(48 RT 8444-8445.)

Clark's counsel's questioning was limited to very select portions of those conversations and created the impression that Investigator Grasso's interview "fed" Weaver much of the information that he testified to at trial. (46 RT 8102-8104, 8114-8116, 8118-8121, 8123-8130, 8137, 8146-8158.) This is precisely the situation evidence Code section 356 is designed to address. (See *People v. Arias*, *supra*, 13 Cal.4th at p. 156.) The fact that the conversations were memorialized in a transcript that was not offered into evidence did not

make the conversations themselves any less admissible. Accordingly, the tape recorded conversations between Weaver and Investigator Grasso were properly admitted under Evidence Code section 356. (See *People v. Sanders* (1995) 11 Cal.4th 475, 520, [where defense counsel elicited portions of investigative interview with witness, prosecution not foreclosed from inquiring into context of statements on redirect examination of witness and cross-examination of investigator].)

However, even assuming the trial court improperly admitted the tape recorded interviews at trial, any error was harmless. The erroneous admission of evidence under Evidence Code section 356 will not result in the reversal of a judgement unless it is reasonably probable that the defendant would have obtained a more favorable result had the evidence not been admitted. (*People v. Arias*, *supra*, 13 Cal.4th at pp. 156-157, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) Here, the introduction of Weaver's tape recorded interviews with Investigator Grasso was harmless. Weaver had already testified to his involvement in the Comp USA robbery case. The introduction of Weaver's tape recorded interviews wherein he admittedly lied to Investigator Grasso about his involvement in the crime, served to remind the jury of Weaver's prior lack of candor. Further, there was overwhelming circumstantial evidence of Clark's guilt. It is not reasonably probable that Clark would have obtained a more favorable result had the tape recorded interviews with Weaver not been admitted. (See *People v. Arias*, *supra*, 13 Cal.4th at pp. 156-157.)

XXXVII.

IT WAS NOT PROSECUTORIAL ERROR TO INTRODUCE EVIDENCE OF CLARK'S INVOLVEMENT WITH ARDELL WILLIAMS IN THE 1990 SOFT WAREHOUSE THEFT BECAUSE THE EVIDENCE WAS ADMISSIBLE AND NOT THE SUBJECT OF THE TRIAL COURT'S EARLIER RULING EXCLUDING EVIDENCE OF CERTAIN 1989 COMPUTER THEFTS

Clark contends that the prosecutor committed error by introducing evidence of Clark's involvement in the 1990 theft from Soft Warehouse with Ardell Williams because the trial court had previously ruled this evidence inadmissible. (AOB 395-405.) Clark forfeited this claim by failing to object and seek an admonition in the trial court and, in any event, no prosecutorial error occurred because the evidence was admissible and not the subject of the trial court's earlier ruling excluding evidence of certain 1989 computer thefts.

Clark has forfeited any claim of prosecutorial error by failing to object and request an admonition in the trial court. In order to preserve a claim of prosecutorial error for review in the appellate court, a defendant "must make a timely objection at trial and request an admonition; otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct." (*People v. Kipp* (2001) 26 Cal.4th 1100, 1130.) Even assuming an objection on the grounds of prosecutorial error was well taken, the evidence presented of Clark's involvement in the 1990 Soft Warehouse theft was a relatively collateral point in an otherwise lengthy trial and the jury could have easily been admonished to disregard this evidence. There is no basis on which to excuse Clark's omission and his failure to object and request an admonition forfeits the claim on appeal. (See *Ibid*; see also *People v. Cunningham*, *supra*, 25 Cal.4th at p. 1020.)

However, even assuming the claim were properly preserved for review, no prosecutorial error occurred. It is well-settled that it is error for a prosecutor

to "*knowingly* elicit testimony that is inadmissible in the present proceedings." (*Ibid.*, original italics.) However, as the record here demonstrates, the evidence of the 1990 Soft Warehouse theft was different in character from the 1989 computer thefts which the trial court had previously ruled inadmissible and was not the subject of the prior ruling.

Richard Highness, an employee of a Soft Warehouse store in Torrance, testified at trial without objection that, on November 1, 1990, Clark, who identified himself as Tom Jones, came into the store to purchase about $10,000 in computer equipment. Clark was provided with the equipment and a customer service agreement to present to the cashier, Ardell Williams, for payment. When Highness later reviewed the day's receipts, there was no receipt for the sale and Williams, upon being questioned about the sale denied having any knowledge of it. (48 RT 8585-8594.)

The day after Highness testified, the trial court initiated a discussion regarding his testimony. (49 RT 8603.) The trial court first noted that the 1990 Soft Warehouse theft had not been part of an earlier Evidence Code section 402 hearing (6 CT 2008-2023, 2124-2127; 14 RT 2924-2946) wherein the trial court had ruled evidence of certain computer thefts committed by Clark in 1989 were not admissible under Evidence Code section 1101, subdivision (b).[35] (49

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35. Evidence Code section 1101 provides:

> (a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion.
>
> (b) Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity,

RT 8604-8605.) Clark's counsel also did not contend that the Soft Warehouse theft evidence had been subject to the court's ruling regarding the 1989 thefts, but did argue that he was unaware of the prosecution's intention to present the evidence. (49 RT 8605.)

The prosecution responded that he had expressly referred to the Soft Warehouse robbery, without objection, during his opening statement. (42 RT 7471-7473; 49 RT 8606.) The prosecution noted that Clark had abandoned his objection to Ardell Williams's prior statements being offered for their truth (14 RT 2915-2922) and that Ardell Williams had discussed her involvement with Clark in the Soft Warehouse theft with Investigator Grasso. (49 RT 8605-8606.) The trial court then indicated that it would entertain a request for an Evidence Code section 1101, subdivision (b) limiting instruction. (49 RT 8607.)

Investigator Grasso later testified that Williams had told him about Clark's participation in the Soft Warehouse theft and that this conversation was included in a police report that was provided to the defense in discovery. (50 RT 8803-8806.) At the conclusion of the case, the trial court, at the prosecution's request, instructed the jury that evidence regarding the Soft Warehouse theft was only to be considered for the limited purpose of showing the relationship between Clark and Williams, motive, and intent, and not for the purpose of showing Clark's bad character or predisposition to commit crimes. (7 CT 2671.)

> absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act.
>
> (c) Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness.

As the record demonstrates, the prosecutor did not knowingly introduce inadmissible evidence about the 1990 Soft Warehouse theft because that evidence had not been the subject of the earlier ruling, which had been limited to the 1989 computer thefts. The evidence of the 1989 thefts, which Ardell Williams had not participated in, was offered to show that Clark had a general interest in stealing computers. (6 RT 2008-2083; 14 RT 2924-2946.) The evidence of the Soft Warehouse theft was fundamentally different from the 1989 computer thefts in a critical respect; the former involved Ardell Williams.

The Soft Warehouse theft was independently relevant to show Clark's prior relationship with Ardell Williams, as well as his motive and intent to murder her. The defense spent considerable effort attacking the credibility of the content of Williams's prior statements. This was the express reason Clark abandoned his objection to the admission of those statements for their truth. (14 RT 2915-2922.) One of the key statements made by Williams was her discussion of eating at the Del Taco restaurant with Clark while he cased the Comp USA store and his adoptive admission that the Comp USA store was his next target. (50 RT 8739-8777.) By showing that Clark had previously been involved in a computer store theft with Williams, it became clear why he would bring her with him on this occasion and thereby bolstered the credibility of the statement and further explained why Williams's potential testimony was so dangerous to Clark and why he had a motive to murder her to prevent her from testifying. This is an appropriate purpose under Evidence Code section 1101, subdivisions (b) and (c). (See *People v. Douglas* (1990) 50 Cal.3d 468, 510 [prior act evidence admissible under 1101 to corroborate witness's testimony implicating defendant as perpetrator of murders], overruled on other grounds in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.)

However, even assuming it was prosecutorial error to elicit testimony about the Soft Warehouse theft, any error was harmless. A prosecutor's knowing solicitation of inadmissible testimony will not result in the reversal of

the judgment unless it is reasonably probable that the defendant would have obtained a more favorable result had the evidence not been admitted. (See *People v. Bonin* (1988) 46 Cal.3d 659, 689-690, overruled on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) The jury was presented with overwhelming circumstantial evidence of Clark's guilt independent of the Soft Warehouse theft evidence. The Soft Warehouse theft evidence "constituted an isolated instance in a lengthy and otherwise well-conducted trial" and it is not reasonably probable that Clark would have obtained a more favorable outcome had the evidence not been admitted. (See *People v. Bonin*, *supra*, 46 Cal.3d at p. 690.)

XXXVIII.

THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE TAPES PLAYED TO ARDELL WILLIAMS'S MOTHER AND SISTER FROM WHICH THEY IDENTIFIED ANTOINETTE YANCEY'S VOICE TO POLICE BECAUSE THE TAPES WERE RELEVANT TO THE CONTESTED ISSUE OF IDENTITY

Clark contends that the trial court improperly admitted the audio tapes played by the police for Ardell Williams's mother and sister Nena in order to identify Antoinette Yancey as the voice of Janet Jackson, the person who lured Williams to her death with promises of a job interview at Continental Receiving. Clark argues that the tapes were never played for the jury in court and that the trial court's order that the tapes be edited to conform to the brief portions actually played for the witnesses when they made their identifications was violated when the tapes were admitted in their entirety.[36/] (AOB 406-413.)

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36. Clark also contends that admission of the tapes violated his confrontation rights under *Crawford*. (AOB 408-410.) First, as discussed in Argument XVII, *ante*, Clark forfeited any objection on Confrontation Clause grounds by failing to object under the Confrontation Clause to the admission of the tape recordings at trial. (*People v. Burgener*, *supra*, 29 Cal.4th at p. 869; but see *People v. Johnson*, *supra*, 121 Cal.App.4th at p. 1411, fn. 2

Initially, Clark forfeited any foundational objection to the admission of the tapes based on the fact that they were not played in court by failing to object and, regardless, there was adequate foundation for the admission of the tapes presented through the testimony of Williams's mother, sister, and Detective Anderson. Further, the trial court properly rejected Clark's challenges that the tapes were irrelevant and subject to exclusion under Evidence Code section 352. Further, the record does not support Clark's assertion that the trial court ordered the tapes be edited and Clark's counsel ultimately abandoned any objections and acquiesced on the record to the admission of the tapes.

Clark's contention that the tapes played to Williams's mother and sister by police in order for them to identify Janet Jackson's voice should not have been admitted for identification purposes because they were not played in open court is meritless. Although Clark made an initial challenge to the admission of the tapes on relevance and section 352 grounds, Clark made no reference to any challenge to the admission of the tapes based on a lack of foundation. Clark's failure to make such a foundational objection forfeits the claim on appeal. (Evid. Code, § 353; see *People v. Williams*, *supra*, 16 Cal.4th at pp. 661-662.)

Regardless, there was adequate foundation to introduce the tapes into evidence. In order to be admissible, an audio recording must be authenticated by evidence " 'that it accurately depicts what it purports to show.' " (Evid. Code, §§ 250 [defining "writing" to include recording], 1401 [requiring authentication of "writings"]; *People v. Williams*, *supra*, 16 Cal.4th at p. 662; *People v. Mayfield* (1997) 14 Cal.4th 668, 747.)

[Confrontation Clause objection not forfeited where trial occurred before decision in *Crawford*].) However, regardless, as discussed in Argument XIII, *ante*, under *Crawford*, the admission of the tapes did not implicate the Confrontation Clause because they were not hearsay and were not considered for their truth. (See *Crawford v. Washington*, *supra*, 541 U.S. at p. 68.)

At trial, the prosecution, without objection, questioned Ardell Williams's mother and sister Nena regarding their identification of the voice of Janet Jackson on audio tapes of voices that the police had played for them during the investigation of Williams's murder (People's Exh. 141). (53 RT 9324-9326; 54 RT 9473-9474.) Detective Anderson then testified in detail as to how the tapes were compiled and played for the witnesses and both witnesses' identification of Yancey's voice as being that of Janet Jackson. (55 RT 9583-9591.) This evidence was adequate to establish the foundation for the later admission of the tapes.

Clark offers no authority for the proposition that playing a tape recording in open court is a condition precedent to the admission of that tape into evidence, where the tape is otherwise admissible and an adequate foundation for the tape is established. (AOB 406-413.) However, even assuming such were the case, it makes Clark's lack of an appropriate objection even more critical, for such an omission could have been easily corrected by permitting the prosecution to reopen its case and play the tape for the jury had the omission been brought to the court's attention in a timely fashion.

Clark's other challenges to the admission of the tapes similarly fail. Although the tapes were not played for the jury in court, the prosecution moved to introduce the tapes into evidence at the close of the trial. (59 RT 10118-10119.) Clark's counsel objected that the tapes contained irrelevant material and should be excluded under Evidence Code section 352. (59 RT 10119-10121.) The trial court overruled Clark's objection, stating,

> The court will permit the tapes to be marked and received as exhibits. Again, I do believe that you may have a meaningful argument there, counsel, but under 352, I believe the probative value is sufficient for the jurors to receive it, and outweighs any prejudicial effect, and they are appropriately received, their admissibility being governed, being a question of weight for the jury.

(59 RT 10121.)

When Clark's counsel indicated that the tape of Yancey's voice included Yancey making statements blaming Clark for Williams's murder to the police, the trial court responded that it would nonetheless permit the tape for voice identification, but would give a limiting instruction if requested by Clark. (59 RT 10121-10122.)

Clark's counsel then sought to limit the tape of Yancey's voice to a 15-second excerpt for voice identification. The prosecution indicated that something could be worked out and the trial court stated that the admission of the tape would therefore remain under submission. (59 RT 10122-10123.)

At a hearing two days later, the trial court revisited the admission of the tapes. The trial court asked if the parties needed the court's participation with respect to the admission of the tapes or if they had reached an agreement. Clark's counsel indicated that the parties had reached an agreement regarding the tapes, although counsel did not communicate the substance of that agreement to the court. (60 RT 10132.) Clark, without discussion, simply agreed that the tapes should be admitted and the trial court admitted the tapes into evidence without objection. (7 CT 2582; 60 RT 10144.)

As the record demonstrates, the trial court never ordered that the tapes be edited as Clark now claims on appeal. Instead, the prosecution expressed its willingness to discuss editing the tapes with Clark's counsel and the court took the matter under submission to permit the parties an opportunity to do so. Two days later, Clark's counsel indicated that the parties were in agreement as to the admission of the tapes and the tapes were admitted without further objection. Clark's failure to press the court for a ruling on, or even discuss, the editing of the tapes prior to their ultimate admission forfeits the claim on appeal. (See *People v. Morris*, *supra*, 53 Cal.3d at p. 190, overruled on other grounds, *People v. Stansbury*, *supra*, 9 Cal.4th at p. 830, fn. 1.)

However, even assuming Clark's claim regarding the failure to edit the tapes were properly preserved on appeal, the tapes were properly admitted. As

discussed in Argument X, *ante*, only relevant evidence is admissible. (Evid. Code, § 350; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 995.) Relevant evidence is defined as,

> evidence, including evidence relevant to the credibility of a witness . . ., having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

(Evid. Code, § 210; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 995.)

A trial court has broad discretion to determine the relevance of evidence and its exercise of discretion "is not grounds for reversal unless ' "the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." ' [Citations.]" (*People v. Ochoa*, *supra*, 26 Cal.4th at pp. 437-438; see also *People v. Cunningham*, *supra*, 25 Cal.4th at p. 995.)

Here, Antoinette Yancey's identity as Janet Jackson, the person who called the Williams home and lured Williams to her death at the Continental Receiving facility was a contested issue at trial. The jury heard the testimony of Williams's mother and sister Nena regarding their pretrial identification of Yancey's voice for the police. Clark's counsel then cross-examined them regarding a tape prepared by the defense and played for the witnesses at the preliminary hearing (Defense Exh. N) where the two had difficulty identifying Yancey's voice. (54 RT 9392-9395, 9491-9493.) This tape (Defense Exh. N) was played for the jury. (54 RT 9394.) A recording of Antoinette Yancey's voice, made at the preliminary hearing (People's Exh. 118), was also played for the jury. (54 RT 9504-9505.)

Accordingly, Clark's challenge to Williams's mother's and sister's identification of Yancey's voice made it necessary for the jury to consider all of the tapes in question, as these formed the basis of their in-court testimony identifying Yancey's voice. The fact that the witnesses may not have listened to the entire tape of Yancey's voice contained in People's Exhibit 141 when

making their identification is of no moment. The critical fact is that the tape contained Yancey's voice and Yancey's voice itself was the relevant evidence. It permitted the jury to consider the pitch, timbre, and other tonal qualities of that sample of her voice and compare the voice to those found on Defense Exhibit N and People's Exhibit 118 in order to judge the reliability of the witnesses's identification of Yancey's as the voice of Janet Jackson.

Similarly, admission of the tapes was proper under Evidence Code section 352. As discussed in Argument XXVI, *ante*, Evidence Code section 352 provides that a court,

> in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Evidence will be found to be substantially more prejudicial than probative if "it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla*, *supra*, 22 Cal.4th at p. 724.) A reviewing court will only disturb a trial court's ruling under Evidence Code section 352 weighing prejudice and probative value upon a showing of an abuse of discretion. (*Ibid.*)

Here, admission of the tape was useful to the jury in resolving the contested issues surrounding Williams's mother's and sister's identification of Yancey's voice as that of Janet Jackson. Considering their difficulty in making an in-court identification based on Defense Exhibit N, which was played for the jury, it was proper for the jury to be permitted to assess the reliability of the earlier identification of Yancey's voice by considering the sample contained in People's Exhibit 141 and comparing it to the other samples found in Defense Exhibit N and People's Exhibit 118. Further, any statements made by Yancey implicating Clark on the tape, though possibly inculpatory if considered for their truth, did not pose an intolerable risk to the fairness of the trial, as the

prosecution did not argue their truth to the jury. Accordingly, admission of the tapes was proper under Evidence Code section 352.

However, even assuming the tapes were improperly admitted without some sort of editing, any error was harmless. Error in the "application of ordinary rules of evidence" is reviewed under the harmless error standard articulated in *People v. Watson*, *supra*, 46 Cal.2d at 836, and will only result in reversal where it is reasonably probable that the defendant would have received a more favorable outcome had the challenged evidence not been admitted. (*People v. Harris*, *supra*, 37 Cal.4th at p. 336.) As discussed previously, there was overwhelming circumstantial evidence of Clark's guilt independent of the tapes played to Williams's mother and sister in the voice lineup. Accordingly, any error in their admission was harmless.

XXXIX.

NENA WILLIAMS'S IN-COURT IDENTIFICATION AT TRIAL OF ANTOINETTE YANCEY WAS NOT THE PRODUCT OF UNDULY SUGGESTIVE PRETRIAL IDENTIFICATION PROCEDURES

Clark contends that Ardell Williams's sister Nena's in-court identification at trial of Antoinette Yancey as the person who delivered flowers to Williams and the caller who arranged the job interview with Williams (53 RT 9300-9310, 9324-9326) was the result of unduly suggestive pretrial identification procedures, making the identical challenge to the pretrial identification procedures addressed in Arguments XIV and XV, *ante*. (AOB 414-422.) However, Nena Williams's in-court identification at trial of Yancey was not the subject of unduly suggestive identification procedures and Clark's claim should be rejected for the same reasons discussed in Arguments XIV and XV, *ante*, and incorporated herein by reference.

XL.

THE TRIAL COURT PROPERLY ADMITTED CRIMINAL DEFENSE ATTORNEY JOHN BARNETT'S EXPERT TESTIMONY AS TO THE PRACTICE OF THE CRIMINAL DEFENSE BAR IN PROVIDING DISCOVERY INFORMATION OBTAINED FROM THE PROSECUTION TO SHOW THAT CLARK HAD KNOWLEDGE OF ARDELL WILLIAMS'S POTENTIAL TO GIVE CRITICAL, DAMNING TESTIMONY IN THE COMP USA CASE AND THEREBY ESTABLISH HIS MOTIVE TO MURDER HER

Clark contends that the trial court improperly permitted Criminal Defense Attorney John Barnett to testify as an expert witness regarding the practice of the criminal defense bar in providing discovery information to clients in criminal cases because his testimony was irrelevant and violated the attorney-client privilege between Clark and his own counsel by inviting speculation as to what occurred between the two in the course of their attorney-client relationship. (AOB 423-435.) However, Barnett's testimony was relevant as circumstantial evidence of Clark's knowledge of the potential for Ardell Williams to give critical, damning testimony against him in the Comp USA case and thereby establish his motive to murder Williams. Further, Barnett's testimony did not violate the attorney-client privilege because it did not reveal a confidential communication between Clark and his attorney.

As discussed in Argument X, *ante*, only relevant evidence is admissible. (Evid. Code, § 350; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 995.) Relevant evidence is defined as,

> evidence, including evidence relevant to the credibility of a witness. . ., having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

(Evid. Code, § 210; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 995.)

A trial court has broad discretion to determine the relevance of evidence and its exercise of discretion "is not grounds for reversal unless ' "the court

exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." ' [Citations.]" (*People v. Ochoa*, *supra*, 26 Cal.4th at pp. 437-438; see also *People v. Cunningham*, *supra*, 25 Cal.4th at p. 995.)

As this Court observed in *People v. Durrant*, *supra*, 116 Cal. at 207-208, "[i]n every criminal case, proof of the moving cause is permissible, and oftentimes is valuable[.]" The jury was instructed according to CALJIC No. 2.51 that it could consider the presence of motive as tending to establish guilt. (7 CT 2686.)

The prosecution sought to have John Barnett, a local criminal defense attorney, testify as an expert witness as to the practices of the criminal defense bar with respect to providing discovery information, such as information relating to Ardell Williams's grand jury testimony and police interviews, to their clients in criminal cases. The prosecution made a lengthy offer of proof as to the relevance of Barnett's testimony. (58 RT 10001-10005.) The prosecution described its theory of motive in the murder of Ardell Williams as follows:

> It is our theory in this case that [Clark's trial counsel] was the vehicle of death. He was the one who processed the information to [Clark] that fueled the motive. [Clark], he's over at the Orange County Jail at the time of Ardell Williams'[s] death. We are not busting his alibi. We are not.
>
> Motive is the - is absolutely the most critical aspect of the prosecution of [Clark] in the death of Ardell Williams. Motive is what this case is about.
>
> ¶ . . .¶
>
> "And as the court knows, we can't call [Clark] to the stand, and we can't call [Clark's trial counsel] to the stand, and so we are going to have Mr. Barnett testifying about what the standard of care would be in the community, and that this information, and the significance of this information, would be communicated to [Clark]."

(58 RT 10000-10001.)

Barnett's testimony was necessary to enable the jury to infer, by circumstantial evidence, Clark's knowledge regarding the potential of Ardell Williams to provide critical, damning testimony regarding the Comp USA case and thereby to establish his motive to murder Williams. This was entirely relevant evidence. (See CALJIC No. 2.51.)

Clark further claims that Barnett's testimony as to what information a competent defense attorney would have provided to his client in terms of discovery violated the attorney-client privilege by allowing the jury to infer what occurred between Clark and his attorney. (AOB 430-433.) Clark's claim is without merit.

First, although Clark's counsel objected to Barnett's testimony as irrelevant, he never objected to its admissibility on the grounds of attorney-client privilege. (58 RT 9993-10015.) Clark's failure to object in the trial court on the grounds of the attorney-client privilege forfeited the claim on appeal. (Evid. Code, § 353; see also *People v. Seijas*, *supra*, 36 Cal.4th at p. 301 ["We have long held that a party who does not object to a ruling generally forfeits the right to complain of that ruling on appeal."].)

However, even assuming Clark's claim of violation of the attorney-client privilege were properly raised on appeal, Barnett's testimony did not implicate the privilege. As discussed in Argument XVI, *ante*, Evidence Code section 954 creates a privilege for the non-disclosure of "a confidential communication between client and lawyer." (*2,022 Ranch, L.L.C. v. Superior Court*, *supra*, 113 Cal.App.4th at p. 1387.) Evidence Code section 952 defines a "confidential communication between client and lawyer" as,

> information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose

> for which the lawyer is consulted, and includes a legal opinion formed and the advice given by the lawyer in the course of that relationship.

The party asserting the attorney-client privilege has the burden of demonstrating the applicability of the privilege. (*Doe 2 v. Superior Court*, *supra*, 132 Cal.App.4th at p. 1522.) A trial court's determination regarding the applicability of the privilege will only be disturbed upon a showing of an abuse of discretion. (See *Id.* at p. 1521.)

"[A]s is apparent on the face of the code section, it is essential to a claim of privilege that there be a communication." (*Grand Lake Drive In, Inc. v. Superior Court*, *supra*, 179 Cal.App.2d at pp. 125-126.) "It is apparent that some ingredient of disclosure or revelation is essential to the element of communication." (*Id.* at p. 126.)

Clark's claim that Barnett's testimony violated attorney-client privilege fails for the simple reason that Barnett did not disclose the contents of any confidential communication between Clark and his counsel. Barnett's testimony merely demonstrated that a mechanism existed whereby Clark could have learned of the potential for Ardell Williams to provide critical, damning testimony regarding the Comp USA case, thereby establishing his motive to murder Williams. It did not involve any disclosure of what actually occurred between Clark and his attorney and therefore did not implicate the attorney-client privilege.

Even assuming arguendo that admission of Barnett's testimony somehow violated the attorney-client privilege, any error was harmless. As discussed in Argument XVI, *ante*, the attorney-client privileges is purely a creation of state statutory law. (*Gonzales v. Municipal Court*, *supra*, 67 Cal.App.3d at p.118.) It is therefore subject to state law harmless error analysis under *People v. Watson*, *supra*, 46 Cal.2d at 836, and will only result in reversal where it is reasonably probable that the defendant would have received a more

favorable outcome had the challenged evidence not been admitted. (See *People v. Roldan*, *supra*, 35 Cal.4th at p. 725.)

Although Barnett's testimony did help to explain Clark's motive to murder Ardell Williams to prevent her from giving potentially damning testimony at his trial in the Comp USA case, there was considerable independent evidence on this point. Williams herself told Special Agent Holliday that "she believed that she would be killed if [Clark] found out that she was talking." (52 RT 9094-9095.) Clark also expressed concern about the possibility of Williams testifying, telling Williams's sister in a phone call that he was concerned that the authorities were trying to link him to a crime in Orange County and that he believed Williams was cooperating with the police. (14 CT 5346-5408.) Clark said that the authorities knew things that only Williams knew and "it kinda shocked me" and "I kind of put two and two together." (14 CT 5356.) Clark was "shocked" that Williams "rolled over so quickly" and it made him "immediately say, never do nothing with her again." (14 CT 5362.)

Clark told Fontenot that if Williams testified against him it would "just kinda like wipe me out." (14 CT 5361.) Clark told Fontenot that "the best answers [Williams] could tell them about me is I don't know." (14 CT 5380.) Clark explained, "[y]ou're her big sister, she don't know nothing about me. Whatever she's told them, that's it. You follow me? . . . She can I don't know 'em to death." (14 CT 5385.) In Clark's words, "Anything she has might of already said, she could come to court and get complete amnesia." (14 CT 5387.) Finally, while in Orange County Jail awaiting trial for the Comp USA robbery and murder of Kathy Lee, Clark showed a trial transcript referencing Ardell Williams to another inmate. (56 RT 9679-9683.) Clark told the inmate, "This is the woman right here that could put me away." (56 RT 9715.)

Based on this evidence, it is not reasonably probable that Clark would have received a more favorable verdict had Barnett's expert testimony as to

Clark's motive to murder Williams not been admitted and any error was harmless.

XLI.

A LETTER FROM CLARK TO YANCEY INSTRUCTING HER TO OBTAIN FALSE IDENTIFICATION AND USE IT TO OPEN A BANK ACCOUNT WAS NOT INADMISSIBLE CHARACTER EVIDENCE, BUT WAS PROPERLY ADMITTED FOR THE PURPOSES OF ESTABLISHING CLARK'S IDENTITY AS A MAJOR PARTICIPANT IN THE COMP USA CASE AND THE CREDIBILITY OF JEANETTE MOORE'S TESTIMONY

Clark contends that the trial court improperly admitted a letter from Clark to Yancey discovered in Yancey's apartment in which Clark instructed Yancey to obtain a false driver's license and use it to open a bank account, in violation of Evidence Code section 1101's prohibition against the use of character evidence. (AOB 436-442.) However, the letter was properly admitted for the purposes of establishing Clark's identity as a major participant in the Comp USA case and the credibility of Jeanette Moore's testimony about obtaining and using the Dena Carey driver's license.

During a pretrial hearing, Clark sought to exclude a letter written by Clark to Yancey that had been seized during the search of Yancey's apartment making reference to obtaining identification using a false name and using it to open a bank account which Clark argued should be excluded under Evidence Code section 1101, subdivision (b).[37/] (16 RT 3167-3168, 3170, 3176-3182,

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37. A portion of the letter in question read:

> When you get the I.D. for Keisha Jackson, open an account at Long Beach Bank. I'll explain to you what the benefits are. I know I'm looking forward to coming home.

(16 RT 3192.)

3186-3193.) The prosecutor argued that the letter corroborated Jeanette Moore's testimony that Clark helped her obtain a fraudulent driver's license and use it to obtain credit cards and to rent the U-Haul that was used in the Comp USA robbery. (16 RT 3168.) The trial court agreed with the prosecution and overruled Clark's objection, finding that "it does have corroboration of some of the witnesses that the defense views as accomplices." (16 RT 3170, 3190-3191, 3193.)

Under Evidence Code section 1101, evidence of the defendant's commission of a crime other than the charged offense is not admissible to show the defendant's bad character or predisposition to criminality, but "may be admitted to prove some material fact at issue, such as motive or identity." (*People v. Roldan*, *supra*, 35 Cal.4th at p. 705.)

> "In cases in which the prosecution seeks to prove the defendant's identity as the perpetrator of the charged offense by evidence he had committed uncharged offenses, admissibility 'depends upon proof that the charged and uncharged offenses share distinctive common marks sufficient to raise an inference of identity.'" [Citation.] A somewhat lesser degree of similarity is required to show a common plan or scheme and still less similarity is required to show intent. [Citation.]

(*Ibid.*)

On appeal, a trial court's ruling regarding the admissibility of evidence under Evidence Code section 1101 will not be disturbed absent a showing of an abuse of discretion. (*Ibid.*)

The letter from Clark to Yancey instructing Yancey to obtain a false driver's license and use it to open a bank account was relevant for a number of purposes. It was established at trial that Jeanette Moore had used a false driver's license to rent a U-Haul truck that was later found by police near the Comp USA store that was robbed by Nokkuwa Ervin and where Kathy Lee was murdered. Moore testified that Clark had helped her to obtain the false driver's license and that she had used it at his direction to obtain credit cards and rent the U-Haul that was found by police. Ardell Williams, in her police interviews

and grand jury testimony, had indicated that she had seen Clark drive a U-Haul after they left the Del Taco restaurant near the Comp USA store and Clark admitted that the Comp USA was his next target.

Accordingly, the use of the Dena Carey driver's license to obtain the U-Haul was relevant to identifying Clark as the mastermind of the robbery and Jeanette Moore's testimony on this point was vigorously attacked by the defense. Evidence of virtually identical activity, wherein Clark had instructed another woman, Antoinette Yancey, to obtain false identification in order to open a bank account and lay the groundwork for a scheme of which Clark would inform her of the "benefits" later (16 RT 3192), tended to show Clark's modus operandi of obtaining false identification for individuals in order for them to take necessary preliminary steps for his criminal enterprises, such as renting U-Hauls or opening bank accounts, that would be more difficult to later trace than if they had used their real names, in order to avoid identification and detection was part of his modus operandi. As Clark had placed his participation in the Comp USA robbery and murder at issue by pleading not guilty and as the letter had a tendency to show his identity and M.O. in the robbery, the evidence was properly admissible under Evidence Code section 1101, subdivision (b). (See *People v. Roldan*, *supra*, 35 Cal.4th at pp. 705-706.) The letter was also admissible to corroborate Moore's testimony under Evidence Code section 1101, subdivision (c). (See *People v. Douglas*, *supra*, 50 Cal.3d 468, 510 [prior act evidence admissible under 1101 to corroborate witness's testimony implicating defendant as perpetrator of murders], overruled on other grounds in *People v. Marshall*, *supra*, 50 Cal.3d at p. 933, fn. 4.)

Further, the evidence was properly admitted under Evidence Code section 352. As discussed in Argument XXVI, *ante*, Evidence Code section

352 provides that a court,

> in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.

Evidence will be found to be substantially more prejudicial than probative if "it poses an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla*, *supra*, 22 Cal.4th at p. 724.) A reviewing court will only disturb a trial court's ruling under Evidence Code section 352 weighing prejudice and probative value upon a showing of an abuse of discretion. (*Ibid.*)

The trial court's weighing of probative value versus the prejudice of the letter instructing Yancey to obtain a false identification was not an abuse of discretion. As discussed above, the letter was quite probative on the issue of Jeanette Moore's credibility and Clark's identity as a major participant in the Comp USA case. In contrast, the admission of the letter did not pose "an intolerable 'risk to the fairness of the proceedings or the reliability of the outcome' [citation]." (*People v. Waidla*, *supra*, 22 Cal.4th at p. 724.) The suggestion that Clark had instructed Yancey to obtain a false identification for the purposes of opening a bank account was not the sort of matter likely to inflame the passion and prejudices of the jurors. The trial court's conclusion that the letter was admissible under Evidence Code section 352 was proper.

However, even assuming the trial court improperly admitted the letter into evidence, any error was harmless. A judgment will not be reversed on appeal based on an error in the admission of evidence under Evidence Code sections 1101 and 352 unless it is reasonably probable that the defendant would have obtained a more favorable result had the evidence not been admitted. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1195, citing *People v. Watson*, *supra*, 46 Cal.2d at p. 836.) As discussed previously, the circumstantial evidence of

Clark's guilt was overwhelming, independent of any suggestion that he had instructed Yancey to obtain a false identification to use in opening a bank account in an unrelated circumstance. It is not reasonably probable Clark would have obtained a more favorable result had the letter not been admitted.

XLII.

THE TRIAL COURT'S INSTRUCTIONS ON REASONABLE DOUBT AND CIRCUMSTANTIAL EVIDENCE ADEQUATELY EXPLAINED THE LAW AND DID NOT LESSEN THE PROSECUTION'S BURDEN OF PROOF BEYOND A REASONABLE DOUBT

Clark contends that the trial court improperly instructed the jury according to CALJIC Nos. 2.90, Presumption of Innocence - Reasonable Doubt - Burden of Proof; 2.01, Sufficiency of Circumstantial Evidence - Generally, and 2.02, Sufficiency of Circumstantial Evidence to Prove Specific Intent Or Mental State. He claims that CALJIC No. 2.90 is "incomprehensible to a modern jury" and that CALJIC Nos. 2.01 and 2.02 undermined the prosecution's burden of proof beyond a reasonable doubt. (AOB 443-454.)

The trial court, without objection, instructed the jury on the burden of proof beyond a reasonable doubt according to CALJIC No. 2.90 as follows:

> A defendant in a criminal action is presumed to be innocent until the contrary is proved, and in case of a reasonable doubt whether [his] guilt is satisfactorily shown, [he] is entitled to a verdict of not guilty. This presumption places upon the People the burden of proving [him] guilty beyond a reasonable doubt.
>
> Reasonable doubt is defined as follows: It is not a mere possible doubt; because everything relating to human affairs is open to some possible or imaginary doubt. It is that state of the case which, after the entire comparison and consideration of all the evidence, leaves the

minds of the jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.

(7 CT 2696.)

This Court has previously found CALJIC No. 2.90 to be "'a constitutionally sound description of reasonable doubt.' " (*People v. Turner* (1994) 8 Cal.4th 137, 203, overruled on other grounds in *People v. Griffin* (2004) 33 Cal.4th 536, 555, fn. 5; see also *People v. Davis* (1995) 10 Cal.4th 463, 520-521; *People v. Webb* (1993) 6 Cal.4th 494, 531.) While this Court has noted that there has been "strong criticism" of CALJIC No. 2.90 and that "substantial modification of the instruction is desirable," this Court also noted that the United States Supreme Court found the instruction not to violate due process in *Victor v. Nebraska* (1994) 511 U.S. 1, 7-17 [114 S.Ct. 1239, 127 L.Ed.2d 583]. (*People v. Davis*, *supra*, 10 Cal.4th at p. 520.)

Clark relies principally on Justice Mosk's concurrence in *People v. Brigham* (1979) 25 Cal.3d 283, 292-316 (conc. opn. of Mosk, J.), wherein Justice Mosk criticized CALJIC No. 2.90 and its formulation of reasonable doubt. (AOB 445-448.) However, a number of Justice Mosk's criticisms have been addressed, such as the deletion of the phrases "moral evidence" and "moral certainty" from the instruction. (See *People v. Ray* (1996) 13 Cal.4th 313, 347, fn. 17.) Accordingly, this Court should reject Clark's challenge to CALJIC No. 2.90. (See *People v. Turner*, *supra*, 8 Cal.4th at p. 203.)

Clark's contention that the trial court's circumstantial evidence instructions (CALJIC Nos. 2.01 and 2.02) unconstitutionally lightened the prosecution's burden of proof and created an unconstitutional mandatory presumption similarly fails. (AOB 450-454.) This Court has previously and repeatedly rejected this claim and Clark provides no basis for this Court revisiting its prior holdings.

The trial court instructed the jury with the standard CALJIC instructions 2.01 and 2.02. (CT 7 CT 2660-2661.) As this Court has explained,

> "[T]hese instructions [CALJIC Nos. 2.01 and 2.02] properly direct the jury to accept an interpretation of the evidence favorable to the prosecution and unfavorable to the defense only if no other 'reasonable' interpretation can be drawn. Particularly when viewed in conjunction with the other instructions correctly stating the prosecution's burden to prove defendant's guilt beyond a reasonable doubt, these circumstantial evidence instructions do not reduce or weaken the prosecution's constitutionally mandated burden of proof or amount to an improper mandatory presumption of guilt. [Citations.]"

(*People v. Koontz* (2002) 27 Cal.4th 1041, 1084-1085, quoting *People v. Kipp*, *supra*, 18 Cal.4th at p. 375; see also *People v. Davis*, *supra*, 10 Cal.4th at p. 521.)

For the same reasons reiterated by this Court in *Koontz*, Clark's claim must be rejected. (See *People v. Koontz*, *supra*, at pp. 1084-1085.)

XLIII.

THE TRIAL COURT PROPERLY INSTRUCTED THE JURY ACCORDING TO CALJIC NO. 2.05, EFFORTS OTHER THAN BY DEFENDANT TO FABRICATE EVIDENCE, BECAUSE THERE WAS AMPLE EVIDENCE THAT CLARK AUTHORIZED THE EFFORTS OF THIRD-PARTIES TO PROCURE FALSE OR FABRICATED EVIDENCE FROM ARDELL WILLIAMS, JEANETTE MOORE AND ALONZO GARRETT

Clark contends that it was improper for the trial court to instruct the jury according to CALJIC No. 2.05,[38] regarding "Efforts Other than by Defendant

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38. The jury was instructed according to CALJIC No. 2.05 as follows:

> If you find that an effort to procure false or fabricated evidence was made by another person for the defendant's benefit, you may not consider that effort as tending to show the defendant's

to Fabricate Evidence," because there was insufficient evidence that he was present during, or authorized, any third-party efforts to fabricate evidence. (AOB 455-464.) However, the trial court properly gave the instruction because there was ample evidence that Clark authorized the efforts of third-parties to procure false or fabricated evidence from Ardell Williams, Jeanette Moore, and Alonzo Garrett and, in any event, any error was harmless.

During a hearing on the proposed jury instructions, the trial court addressed the prosecution's request to instruct the jury according to CALJIC No. 2.05. (63 RT 10578-10579.) The trial court asked the prosecutor what the proposed instruction referred to. The prosecutor first indicated that it addressed Clark's efforts, during his tape recorded conversation with Ardell Williams's sister Liz Fontenot, to convince Fontenot to "get selective amnesia." (63 RT 10578.) Clark's counsel objected that this was an effort by Clark to fabricate evidence, which was already addressed in CALJIC No. 2.04, Efforts by Defendant to Fabricate Evidence. The trial court disagreed. The prosecutor then indicated that the instruction also related to Clark's efforts to have Sean Birney, a fellow inmate in the Orange County Jail, write letters to Alonzo Garrett and Jeanette Moore seeking to dissuade them from testifying. The trial court, without objection, ruled that CALJIC No. 2.05 would be given.

Although Clark's counsel challenged one of the three instances cited by the prosecution to support giving the instruction as being an effort by Clark to fabricate, rather than an effort by a third-party, his silence in the face of the other two cited instances forfeits the claim on appeal. (See *People v. Valdez*

> consciousness of guilt unless you also find that the defendant authorized that effort. If you find defendant authorized the effort, that conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.

(7 CT 2664.)

(2004) 32 Cal.4th 73, 137 [failure to object to giving CALJIC No. 2.06 forfeited claim of error].)

However, regardless, the jury was properly instructed according to CALJIC No. 2.05.

> " 'It is an elementary principle of law that before a jury can be instructed that it may draw a particular inference, evidence must appear in the record which, if believed by the jury, will support the suggested inference.' "

(*Ibid.*) Instructing the jury according to CALJIC No. 2.05 that it could infer consciousness of guilt based on third-party efforts to fabricate evidence is appropriate when the record establishes that the defendant has authorized the effort to procure the false or fabricated evidence. (See *People v. Hannon* (1977) 19 Cal.3d 588, 600; *People v. Terry* (1962) 57 Cal.2d 538, 565-566.)

The defendant's authorization to a third-party to procure false or fabricated evidence may be established by circumstantial evidence. (*Id.* at p. 566.) However, something more than mere opportunity or evidence of a personal relationship between the defendant and the third-party must be shown in order to establish the defendant's authorization. (*Ibid.*; *People v. Williams* (1997) 16 Cal.4th 153, 200-201.)

In each instance, there was sufficient evidence presented at trial that Clark authorized the third-party attempts to procure false or fabricated evidence to support giving CALJIC No. 2.05. In the case of Liz Fontenot, Clark, during his tape recorded conversation, told Fontenot that if Williams testified against him it would "just kinds like wipe me out." (14 CT 5361.) Clark told Fontenot that "the best answers [Williams] could tell them about me is I don't know." (14 CT 5380.) Clark explained, "[y]ou're her big sister, she don't know nothing about me. Whatever she's told them, that's it. You follow me? . . . She can I don't know 'em to death." (14 CT 5385.) In Clark's words, "Anything she has

might of already said, she could come to court and get complete amnesia." (14 CT 5387.)

The clear implication of Clark's statements to Fontenot was that she should convince Williams's to cease her cooperation with the police and testify falsely that she either did not know or did not remember the events in question.[39] This was a naked attempt by Clark to personally convince Fontenot to influence her sister to testify according to Clark's wishes and the tape recording was direct evidence of that effort.

With respect to the letter seeking to dissuade Jeanette Moore from testifying and the death threat received by Alonzo Garrett,[40] as discussed in Argument XXVIII, *ante*, there was substantial evidence that Clark authorized Orange County Jail inmate Sean Burney to send the letters.

Birney's fingerprints were found on the envelope and letter sent to Moore and on the threatening letter to Garrett confiscated from Clark's cell. (47 RT 8286-8293; 57 RT 9939-9942.) After the letter to Garrett was confiscated, Clark admitted to Deputy Desens that the letter to Garrett belonged to him and asked for its return. (57 RT 9943-9944.) Clark's acknowledgment of ownership would enable the jury to conclude that Clark had authorized the

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39. Clark also argues that the instruction was improper because there is no evidence that Fontenot actually did attempt to persuade Williams to testify falsely. (AOB 457-459.) However, after the conversation in which Clark suggested that Williams get "amnesia," he spoke to Fontenot again. Fontentot told Clark that she had spoken to Williams as Clark had asked and that Williams had indicated that she was mostly answering police questions with, "I don't knows." (14 CT 5394-5395.) Although Fontenot did not expressly state that she had suggested to Williams giving this sort of answer during their conversation, this was certainly circumstantial evidence that Fontenot had made some sort of attempt to influence Williams's testimony during their conversation.

40. The text of the letter and article sent to Moore are found at 6 CT 2242-2245. The text of the letter sent to Garrett is found at 6 CT 2241.

creation of the letter to dissuade Garrett, as well as the further inference that, if he had authorized Birney's efforts to dissuade Garrett, he had authorized Birney's efforts to dissuade Moore as well. The jury could conclude from this evidence that Clark was utilizing Birney to author letters to dissuade witnesses in the case from testifying at trial. This evidence directly connected Clark to the letters and was sufficient to justify giving CALJIC No. 2.05.

Even if the trial court improperly instructed the jury according to CALJIC No. 2.05, any error was harmless. Error in instructing the jury regarding consideration of evidence of defense efforts to fabricate evidence will not result in reversal of the judgment unless it is reasonably probable that the defendant would have obtained a more favorable result had the instruction not been given. (See, e.g., *People v. Hannon*, *supra*, 19 Cal.3d at p. 603 [applying *People v. Watson*, *supra*, 46 Cal.2d at p. 836, where evidence did not support giving CALJIC No. 2.06.].)

There is simply no reasonable likelihood that CALJIC No. 2.05 caused the jury to draw an impermissible inference. As the Court of Appeal noted in *People v. Gutierrez* (1978) 80 Cal.App.3d 829, 837, such an instruction is given for a defendant's benefit. The language of the instruction expressly warns jurors that evidence that a defendant authorized an effort to procure false or fabricated testimony is not sufficient to establish his guilt. Thus, even if the jury inferred consciousness of guilt based on Clark's efforts to convince Williams, Moore, and Garrett to fabricate evidence, the instruction required that the jury consider the other evidence presented at trial in order to justify a guilty verdict. In addition, CALJIC No. 2.05 admonished the jury that unless it found that defendant authorized the efforts as fabricated, no inference of consciousness of guilt could be drawn. Furthermore, the jury was specifically instructed according to CALJIC No. 17.31 to disregard any instructions it found factually inapplicable. (7 CT 2771-A.) Further, there was overwhelming circumstantial evidence of Clark's guilt independent of the evidence that he

sought third-party assistance in procuring false or fabricated evidence. It is therefore not reasonably probable that Clark would have obtained a more favorable result had CALJIC No. 2.05 not been given.

XLIV.

THE TRIAL COURT HAD NO SUA SPONTE OBLIGATION TO INSTRUCT THE JURY ACCORDING TO CALJIC NO. 2.91, BURDEN OF PROVING IDENTITY BASED SOLELY ON EYEWITNESSES, AND THE INSTRUCTIONS GIVEN ADEQUATELY ADDRESSED EYEWITNESS IDENTIFICATION AND THE PROSECUTION'S BURDEN OF PROOF

Clark contends that the trial court improperly failed to instruct the jury according to CALJIC No. 2.91, Burden of Proving Identity Based Solely On Eyewitnesses.[41] (AOB 465-469.) However, the trial court was under no obligation to instruct the jury according to CALJIC No. 2.91 and the instructions given adequately addressed eyewitness identification and the prosecution's burden of proof.

The trial court was under no obligation to instruct the jury according to CALJIC No. 2.91 because Clark did not request such an instruction in the trial court (7 CT 2623-2652; 63 RT 10574-10679; 64 RT 10698-10807) and the other instructions given adequately addressed any issues relating to eyewitness

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41. CALJIC No. 2.91 provides:

> The burden is on the People to prove beyond a reasonable doubt that the defendant is the person who committed the crime with which [he] [she] is charged.
>
> If, after considering the circumstances of the identification [and any other evidence in this case], you have a reasonable doubt whether defendant was the person who committed the crime, you must give the defendant the benefit of that doubt and find [him] [her] not guilty.

identification. This Court has previously observed that trial courts do not have a sua sponte duty to instruct with CALJIC No. 2.91 where "the court's 'general instructions on credibility and burden of proof were sufficient to inform the jury of the test they should apply to the identification evidence.' " (*People v. Alcala*, *supra*, 4 Cal.4th at pp. 802-803.)

Here, as in *Alcala*, the trial court instructed the jury according to CALJIC No. 2.20, Believability of Witness; CALJIC No. 2.21.1, Discrepancies In Testimony; CALJIC No. 2.22, Weighing Conflicting Testimony; CALJIC No. 2.27, Sufficiency of Testimony of One Witness, and CALJIC No. 2.90, Presumption of Innocence - Reasonable Doubt - Burden of Proof. (7 CT 2675-2677, 2679, 2681, 2696.) These instructions,

> clearly addressed [Clark's] challenge to the reliability of the testimony which identified him" and "were sufficient to inform the jury that the prosecution had the burden of establishing identity, and that [Clark] should be acquitted in the event the jury harbored a reasonable doubt on the issue of identity.

(See *People v. Alcala*, *supra*, 7 Cal.4th at p. 803.)

XLV.

THE TRIAL COURT WAS UNDER NO OBLIGATION TO INSTRUCT THE JURY ACCORDING TO CALJIC NO. 3.02 ON THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE AS TO COUNT 1 BECAUSE THE PROSECUTION RELIED SOLELY ON A FELONY-MURDER THEORY AS TO THAT COUNT

Clark contends that the trial court had a sua sponte obligation to instruct the jury according to CALJIC No. 3.02, Principals-Liability for Natural and Probable Consequences. (AOB 470-480.) However, because the prosecution did not rely on the natural and probable consequences doctrine as a theory of liability for any of the charged offenses, the trial court was under no obligation to give such an instruction to the jury.

Trial courts have a sua sponte duty to instruct the jury " 'on general principles of law that are closely and openly connected with the facts presented at trial.' " (*People v. Avila*, *supra*, 38 Cal.4th at p. 567.) This includes instructing on the natural and probable consequences doctrine where the doctrine is relied on by the prosecution as a theory of liability and there is evidence to support it. (See *Id.* at p. 568.) Trial courts also have a,

> correlative duty "to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues."

(*People v. Saddler* (1979) 24 Cal.3d 671, 681.)

Clark contends that the prosecution relied on the natural and probable consequences doctrine as a theory of liability for the murder of Kathy Lee at the Comp USA store charged in Count 1. (AOB 471.) However, the record does not support his contention.

At the close of trial, the prosecution submitted CALJIC No. 3.02 regarding the natural and probable consequences doctrine as a proposed jury instruction.[42/] (7 CT 2632.) However, at a hearing on the proposed jury

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42. CALJIC No. 3.02 provides:

> One who aids and abets [another] in the commission of a crime [or crimes] is not only guilty of [that crime] [those crimes], but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime[s] originally aided and abetted.
>
> In order to find the defendant guilty of the crime[s] of _____, [as charged in Count[s] _____,] you must be satisfied beyond a reasonable doubt that:
>
> 1. The crime [or crimes] of _____ [was] [were] committed;
>
> 2. That the defendant aided and abetted [that] [those] crime[s];

instructions, the prosecution, without objection, withdrew its request that the instruction be given. (64 RT 10754.)

As to Count 1, the jury was ultimately only instructed according to a felony-murder theory. (7 CT 2733-2743.) This was the only theory of murder argued by the prosecutor as to Count 1. (65 RT 10819-10821.) As the prosecutor noted in his closing argument,

> [W]ith respect to the murder of Kathy Lee [in Count 1], the theory so to speak, the type of malice or the type of mental state is felony murder.

(65 RT 10820.)

The felony-murder rule and the natural and probable consequences doctrine are two separate and distinct theories of criminal liability. (*People v. Culuko* (2000) 78 Cal.App.4th 307, 322.) Under the felony-murder rule, a

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> 3. That a co-principal in that crime committed the crime[s] of _____; and
>
> 4. The crime[s] of _____ [was] [were] a natural and probable consequence of the commission of the crime[s] of _____.
>
> [In determining whether a consequence is "natural and probable," you must apply an objective test, based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A "natural" consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. "Probable" means likely to happen.]
>
> [You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you are satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of an identified and defined target crime and that the crime of (charged crime) was a natural and probable consequence of the commission of that target crime.]

homicide is first-degree murder where it is committed during the commission of certain enumerated felonies, including robbery and burglary. (Pen. Code, § 189; see *People v. Cavitt* (2004) 33 Cal.4th 187, 197.) The specific intent required is merely the intent to commit the underlying felony. (*Ibid.*)

In contrast, under the natural and probable consequences doctrine,

> a person who encouraged or facilitated the commission of a crime could be held criminally liable for the crime he encouraged or facilitated, as well as for "any other offense that was a 'natural and probable consequence' of the crime aided and abetted."

(*People v. Avila*, *supra*, 38 Cal.4th at p. 567.)

As Justice Werdegar noted in her concurring opinion in *Cavitt*,

> Commentators have observed that the two complicity rules (that governing felony murder and that governing aiding and abetting generally) involve similar imputations of conduct and culpability [citation] and may be seen as general and specific aspects of the same problem- "the problem of the responsibility of one criminal . . . for the conduct of a fellow-criminal . . . who, in the process of committing or attempting the agreed-upon crime, commits another crime" [Citation]. The language used to define the scope of the two rules also is linked historically in California law. [Citations.] Nevertheless, complicity appears broader under the felony-murder rule than under the natural and probable consequences doctrine, which we have described as resting on foreseeability, in that a felon may be held responsible for a killing by his or her cofelon, under the felony-murder rule, even if the killing was not foreseeable to the nonkiller because "the plan as conceived did not contemplate the use or even the carrying of a weapon or other dangerous instrument." [Citation.]

(*People v. Cavitt*, *supra*, 33 Cal.4th at p. 212, fn.2 (conc. opn. of Werdegar, J.)

Here, the prosecution's theory was that Kathy Lee was murdered in the course of the burglary and robbery of the Comp USA store, crimes which Clark aided and abetted through his meticulous planning and organization of the details necessary for their commission. These are two of the felonies enumerated under Penal Code section 189. Accordingly, it was unnecessary to show that Lee's murder was a necessary and probable consequence of the burglary and robbery. (See *Ibid.*) Indeed, improperly interjecting the principles

of forseeability underlying the natural and probable consequences doctrine into the case would have undermined the policy rationale at the heart of the felony-murder rule, since, as this Court has noted,

> The purpose of the felony-murder rule is to deter those who commit the enumerated felonies from killing by holding them strictly responsible for any killing committed by a cofelon, whether intentional, negligent, or accidental, during the perpetration or attempted perpetration of the felony.

(*People v. Avila*, *supra*, 33 Cal.4th at p. 197.)

To instruct on a wholly superfluous theory of liability would have injected uncertainty and confusion into an otherwise orderly trial. Accordingly, as the natural and probable consequences doctrine was not closely and openly connected to the facts of the case, the trial court was under no obligation to instruct the jury according to CALJIC No. 3.02.

XLVI.

THE TRIAL COURT PROPERLY DECLINED TO INSTRUCT THE JURY THAT ARDELL WILLIAMS, JEANETTE MOORE, AND MATTHEW WEAVER WERE ACCOMPLICES AS A MATTER OF LAW UNDER CALJIC NO. 3.16 BECAUSE THE EVIDENCE WAS NOT CLEAR AND UNDISPUTED ON THIS POINT AND IT WAS THEREFORE APPROPRIATE TO INSTRUCT THE JURY TO DETERMINE WHETHER THE WITNESSES WERE ACCOMPLICES ACCORDING TO CALJIC NO. 3.19

Clark contends that the trial court improperly declined to instruct the jury according to CALJIC No. 3.16, Witness Accomplice as Matter of Law,[43/] that

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43. CALJIC No. 3.16 provides:

> If the crime of _____ was committed by anyone, the witness _____ was an accomplice as a matter of law and [his] [her] testimony is subject to the rule requiring corroboration.

Matthew Weaver, Ardell Williams, and Antoinette Yancey were accomplices as a matter of law and their testimony therefore required corroboration. (AOB 481-488.) However, the evidence was not clear and undisputed as to these witnesses' status as accomplices and it was appropriate to have the jury make this determination according to CALJIC No. 3.19.

Penal Code section 1111 requires corroboration of accomplice testimony and defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Pen. Code, § 1111; *People v. Williams*, *supra*, 16 Cal.4th at p. 679.) The determination of whether a witness is an accomplice is a factual question for the jury to resolve " 'unless the evidence permits only a single inference.' " (*Ibid.*) A trial court can therefore "decide as a matter of law whether a witness is or is not an accomplice only when the facts regarding the witness's criminal culpability are 'clear and undisputed.' " (*Ibid.*)

"In order to be chargeable with the identical offense, the witness must be considered a principal under [Penal Code] section 31," which defines principals as,

> [a]ll persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission. . . .

(*People v. Horton*, *supra*, 11 Cal.4th at pp. 1113-1114.) "An accomplice must have ' "guilty knowledge and intent with regard to the commission of the crime." ' " (*People v. Lewis* (2001) 26 Cal.4th 334, 369.) However, an accessory, cannot be prosecuted for the identical offense, and therefore is not an accomplice. (*Ibid.*)

During a hearing on the proposed jury instructions, Clark's counsel argued that the jury should be instructed according to CALJIC No. 3.16 that

Matthew Weaver, Jeanette Moore, and Ardell Williams were accomplices as a matter of law. (64 RT 10740.) The trial court disagreed, holding that the jury should determine whether these witnesses were accomplices according to CALJIC No. 3.19. (64 RT 10741-10742.) The trial court later instructed the jury according to CALJIC No. 3.19, Burden to Prove Corroborating Witness Is an Accomplice,[44] along with the panoply of standard accomplice instructions (CALJIC Nos. 3.10, 3.11, 3.12, 3.13, 3.14, and 3.18). (7 CT 2700-2706.)

In finding that the evidence was insufficient to establish that Williams, Moore, and Weaver were accomplices as a matter of law, the court made special note of Weaver, explaining,

> I particularly, for purposes of the record, want to speak out on Matt Weaver, who in this court's opinion, if anyone would fall under the mantel of [accomplice] as a matter of law, it would be more likely he than the other two.
>
> The court does not feel that even in his case it would be as a matter of law. It would be a question of fact for the jurors.
>
> I will indicate for the record that during some of our out-of-court time I did spend considerable time reviewing the law on accomplices, and we do have evidence before the jury from his own mouth, whether they believe him or not, that the extent of his involvement was not criminal in nature.

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44. The jury was instructed according to CALJIC No. 3.19 as follows:

> You must determine whether the witnesses Ardell Williams, Jeanette Moore and/or Matthew Weaver were accomplices as I have defined that term.
>
> The defendant has the burden of proving by a preponderance of the evidence that a witness was an accomplice in the crimes charged against the defendant.
>
> In determining whether the defendant has met this burden you may consider evidence presented by the prosecution as well as that presented by the defense.

> If they elect to believe him, then of course that would dispel [his] accomplice role in all respects. But again, that becomes a question of fact for the jury and credibility.

(64 RT 10742.)

The trial court correctly concluded that the evidence of Williams's, Moore's, and Weaver's status as accomplices was not "clear and undisputed" and therefore susceptible of only one interpretation, as required in order to find these witnesses to be accomplices as a matter of law. (*People v. Williams*, *supra*, 16 Cal.4th at p. 679.) The evidence presented as to each of these individuals did not establish the essential element required for accomplice liability as to the charged offenses: the " ' "guilty knowledge and intent with regard to the commission of the crime." ' " (*People v. Lewis*, *supra*, 26 Cal.4th at p. 369.)

Clark improperly focuses on the witnesses's participation in other uncharged criminal acts: i.e. the theft, the fraudulent traveler's check scheme, and the fraudulent driver's license. (AOB 483-484.) However, under Penal Code section 1111, an accomplice is only "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Pen. Code, § 1111, emphasis added.) Therefore, only the charged offenses relating to the Comp USA case and Williams's murder are relevant to the instant inquiry.

First, as to Williams, although she accompanied Clark while he cased the Comp USA store prior to the robbery, she did not provide Clark with any advise or assistance or otherwise participate or share in the criminal intent underlying the crimes. (50 RT 8741-8747.) While Clark presented the testimony of Williams's psychiatrist that Williams told her during therapy that she had gone to dinner with an ex-boyfriend named Bill and that after dinner they had stopped to rob a computer store in Fullerton and shot a clerk, (61 RT 10272-10273), there was no other evidence supporting this statement and, at

best it created a factual question as to Williams's accomplice status to be resolved by the jury, as the jury was instructed to do according to CALJIC No. 3.19.

Moore similarly lacked the knowledge and intent necessary to be charged with the identical offenses as Clark. Although obtaining the Dena Carey credit card and using it to rent the U-Haul truck was of assistance, there was no evidence to indicate that she was aware of Clark's intended use of the U-Haul or the plan to rob the Comp USA. Again, this was at best a jury question to be resolved per CALJIC No. 3.19.

Finally, the trial court's observation regarding Matthew Weaver was an accurate assessment of the state of the record. Although Clark sought to paint Weaver as a culpable participant in the Comp USA robbery, Weaver's own statements to the police and in-court testimony indicated that he was an unwitting participant, believing that Clark owned the store and that he would receive $100 to move computers in the store. (45 RT 8002-8012.) Again, Weaver's status as an accomplice in the Comp USA robbery was a jury question to be resolved as required under CALJIC No. 3.16.

However, even assuming the trial court should have instructed the jury that one or more of these witnesses was an accomplice as a matter of law, any error was harmless. First of all, the jury was instructed that it was required to determine whether these witnesses were accomplices and to view accomplice testimony with distrust. (7 CT 2705-2706.) Further, the failure to give an appropriate accomplice instruction will be found to be harmless where there is

> "sufficient corroborating evidence in the record." [Citation.] To corroborate the testimony of an accomplice, the prosecution must present "independent evidence," that is, "evidence that tends to connect the defendant with the crime charged" without aid or assistance from the accomplice's testimony. [Citation.] Corroborating evidence is sufficient if it tends to implicate the defendant and thus relates to some act or fact that is an element of the crime. [Citations.] " '[T]he corroborative

evidence may be slight and entitled to little consideration when standing alone.' [Citation.]" [Citation.]

(*People v. Avila*, *supra*, 38 Cal.4th at pp. 562-563.)

There was ample corroborating evidence of Clark's guilt. In addition to a BMW like Clark's being seen leaving the scene of the Comp USA robbery, Clark's statements to Garrett that Williams could "put [him] away" for the Comp USA case and his successful efforts to murder Williams to prevent her from testifying in the case demonstrated his consciousness of guilt and, in conjunction with the other evidence in the case, adequately corroborated their testimony regarding his participation in the Comp USA robbery and murder.

XLVII.

CLARK FORFEITED ANY CHALLENGE TO CALJIC NO. 6.14 BY NOT OBJECTING IN THE TRIAL COURT AND, IN ANY EVENT, CALJIC NO. 6.14 IS A CORRECT STATEMENT OF LAW RELATING TO THE CRIME OF CONSPIRACY

Clark contends that the trial court improperly instructed the jury according to CALJIC No. 6.14,[45] "Acquaintance with All Co-conspirators Not Necessary," and that this instruction improperly lessened the prosecution's

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45. The trial court instructed the jury according to CALJIC No. 6.14 as follows:

> It is not a defense to the crime of conspiracy that an alleged conspirator did not know all the other conspirators. [The members of a conspiracy may be widely separated geographically, and yet may be in agreement on a criminal design and may act in concert in pursuit of that design.] The adoption by a person of the criminal design and criminal intent entertained in common by others and of its object and purposes is all that is necessary to make that person a co-conspirator when the required elements of a conspiracy are present.

(7 CT 2720.)

burden of proof. Clark argues that, because co-defendant Yancey's jury did not find an allegation that Yancey personally used a firearm in Williams's murder to be true beyond a reasonable doubt, a separate conspiracy must have existed between Yancey and some third party to murder Williams and there was no evidence to connect Clark to this conspiracy. (AOB 489-493.) However, Clark forfeited the claim by failing to object to the instruction in the trial court and, in any event, CALJIC No. 6.14 is a correct statement of law and the jury verdict in Yancey's trial was not binding in the instant case and had no effect on the instructions given.

In the first instance, Clark forfeited any objection to CALJIC No. 6.14. A criminal defendant's failure to object to a jury instruction forfeits any challenge to the instruction on appeal. (*People v. Jones* (2003) 29 Cal.4th 1229, 1258.) During a hearing on the proposed jury instructions, Clark's counsel was expressly asked if he objected to the trial court instructing the jury according to CALJIC No. 6.14. Clark's counsel responded that he had no objection. (63 RT 10607.) This forfeited the claim on appeal. (See *Ibid.*)

However, even assuming Clark's claim is properly raised in this Court, it is without merit. CALJIC No. 6.14 is a correct statement of law regarding the offense of conspiracy. (See *People v. Van Eyk* (1961) 56 Cal.2d 471, 479 ["The fact that the defendant may not have personally known the identity or exact functions of all the members of the conspiracy is immaterial."].) Clark nonetheless argues that it was improper to give the instruction in this case because of the possibility that there was a second conspiracy between Yancey and some third party to kill Williams and there was no evidence linking Clark to this second conspiracy. (AOB 489-491.)

Clark relies on the jury verdict in Yancey's separate murder trial, wherein the jury did not find an allegation that Yancey personally used a firearm in Williams's murder to be true (11 CT 4115-4117) to support his contention that there were two separate and distinct conspiracies to murder

Williams. Evidentiary support for Clark's contention is conspicuously absent from the record on appeal. Further, Clark provides no authority, either in law or logic, to support the proposition that the verdict in Yancey's separate trial, rendered by another jury after the conclusion of the guilt phase of Clark's trial, is of any import in this case. Indeed, it is difficult to comprehend how the verdict in Yancey's trial could have effected the jury instructions given in Clark's trial, which preceded the Yancey verdict by more than six months.[46/]

As this Court has noted,

> " '[I]n cases where there are multiple defendants, or in multiple cases arising out of the same offense, the mere fact standing alone that verdicts are, or appear to be, inconsistent, does not give rise to collateral estoppel. Specific issues may be decided differently in different cases. [Citation.] Likewise, a judgment acquitting one defendant does not generally bar subsequent criminal liability of a codefendant.' "

(*People v. Lawley* (2002) 27 Cal.4th 102, 163-164.)

Clark's jury was free to, and, as the special circumstances findings show, did, conclude from the evidence presented that Yancey was personally armed with a firearm during the commission of Williams's murder in the Continental Receiving lot, thereby achieving the object of the conspiracy between Yancey and Clark, without regard to the verdict in Yancey's case. (8 CT 2784-2785.) Clark's claim is without merit.

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46. The jury in the guilt phase of Clark's trial rendered its verdict on May 21, 1996. (8 CT 2915-2917.) The verdict in Yancey's case was rendered on December 12, 1996. (11 CT 4123-4128.)

XLVIII.

THE TRIAL COURT WAS UNDER NO OBLIGATION TO INSTRUCT THE JURY ACCORDING TO CALJIC NOS. 17.10 AND 17.49 BECAUSE THERE WAS NO DEADLOCK OR CONFUSION AS TO THE ORDER OF DELIBERATIONS ON COUNT 7

Clark contends that the trial court was under a sua sponte obligation to instruct the jury according to CALJIC Nos. 17.10 and 17.49 that it could consider the charges of first and second degree murder in Count 7 in any order it wished, but could not return a verdict on lesser offenses unless it has unanimously agreed on a disposition of the greater offense. (AOB 494-501.) To the contrary, the trial court had discretion to withhold such an instruction unless and until the jury deadlocked on this issue and, as no deadlock occurred and there is no evidence the jury was confused as to the order of their deliberations on Count 7, the instruction was unnecessary. Accordingly, there was no error.

The trial court properly instructed the jury according to CALJIC Nos. 8.30, 8.70, and 8.71 on second degree murder as a lesser included offense of first degree murder as charged in Count 7, relating to the murder of Ardell Williams. (7 CT 2740-2743; *People v. Blair* (2005) 36 Cal.4th 686, 745 [second degree murder is a lesser included offense of first degree murder].)

The trial court also indicated its willingness to instruct the jury according to CALJIC No. 17.10 (Conviction of Lesser Included or Lesser Related Offense-Implied Acquittal-First) believing it could "perhaps" be "helpful" to the jury, but stated that "if nobody thinks it's necessary . . . I'm not tied to it." Both the prosecutor and Clark's counsel indicated that they did not believe the instruction was applicable. (63 RT 10653-10654.) The trial court was correct in not instructing the jury according to CALJIC No. 17.10 and its companion instruction, CALJIC No. 17.49, under the circumstances.

CALJIC No. 17.10 pertinently provides:

If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict [him] [her] of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime.

[The crime of _____ [as charged in Count _____] is lesser to that of _____ charged in Count _____.]

Thus, you are to determine whether [a] [the] defendant[s] [is] [are] guilty or not guilty of the crime[s] charged [in Count[s] _____] or of any lesser crime [s]. In doing so, you have discretion to choose the order in which you evaluate each crime and consider the evidence pertaining to it. You may find it productive to consider and reach a tentative conclusion on all charges and lesser crimes before reaching any final verdict[s]. However, the court cannot accept a guilty verdict on a lesser crime unless you have unanimously found the defendant not guilty of the [charged] [greater] crime.

CALJIC No. 17.49 similarly provides:

[In this case, the defendant has been charged with (burglary, robbery, kidnapping, etc.) , [a] [all] felon[y][ies]. The foregoing charged crime[s] include[s] the lesser offense[s] of (theft, misdemeanor false imprisonment, etc.) .]

You will be given [_____] verdict forms encompassing both the charged crime [s] and the lesser included offense[s].

Since the lesser offense[s] [is] [are] included in the greater, you are instructed that if you find the defendant guilty of the greater offense[s], you should not complete the verdict[s] on the corresponding lesser offense[s] and [that] [those] verdict[s] should be returned to the Court unsigned by the Foreperson.

If you find the defendant not guilty of the felon[y][ies] charged, you then need to complete the verdict[s] on the lesser included offense[s] by determining whether the defendant is guilty or not guilty of the lesser included crime[s], and the corresponding verdict[s] should be completed and returned to the Court signed by the Foreperson.

These instructions are based on this Court's holdings in *Stone v. Superior Court* (1982) 31 Cal.3d 503, and *People v. Kurtzman* (1988) 46 Cal.3d 322. (See Use Notes to CALJIC Nos. 17.10, 17.49.) This Court explained that,

> while the jury may consider charges in any order it wishes to facilitate ultimate agreement on a conviction or acquittal, it may not return a verdict on lesser offenses unless it has unanimously agreed on a disposition of the greater.

(*People v. Kurtzman*, *supra*, 46 Cal.3d at p. 332.)

Trial courts have a sua sponte duty to instruct the jury "'on general principles of law that are closely and openly connected with the facts presented at trial.' " (*People v. Avila*, *supra*, 38 Cal.4th at p. 567.) However, under *Stone* and *Kurtzman*, while a trial court may instruct the jury according to CALJIC Nos. 17.10 and 17.49 at the start of deliberations, the trial court has the discretion not to instruct a jury according to CALJIC Nos. 17.10 and 17.49 unless and until a jury deadlock arises. (*People v. Fields* (1996) 13 Cal.4th 289, 309.) The court in this case followed the latter procedure and, as there is no indication in the record that the jury deadlocked as to Count 7 or that the jury was confused as to the order of their deliberations on Count 7, the trial court was under no obligation to instruct the jury according to CALJIC Nos. 17.10 and 17.49. (*Ibid.*) There was no error.

XLIX.

SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S FINDINGS THAT CLARK WAS A MAJOR PARTICIPANT AND ACTED WITH RECKLESS INDIFFERENCE TO HUMAN LIFE IN THE COMP USA CRIMES AND THAT HE HAD AN INTENT TO KILL ARDELL WILLIAMS

Clark contends that there is insufficient evidence that he was a major participant and acted with reckless indifference to human life in the Comp USA

crimes or that he had the intent to kill Ardell Williams to support the special circumstance allegations. (AOB 502-513.) However, there is ample evidence in the record to support the jury's findings as to the special circumstance allegations.

When determining whether substantial evidence supports a special circumstance finding, a reviewing court considers the evidence "in the light most favorable to the prosecution" to determine whether "any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt." (*People v. Dickey* (2005) 35 Cal.4th 884, 903.)

The Eighth Amendment prohibits the imposition of the death penalty in felony murder cases where the defendant was not the actual killer, did not participate in the killing, and lacked any culpable mental state. (*Tison v. Arizona* (1987) 481 U.S. 137, 147-156 [107 S.Ct. 1676, 95 L.Ed.2d 127], citing *Edmund v. Florida* (1982) 458 U.S. 782 [102 S.Ct. 3368, 73 L.Ed.2d 1140].) Imposition of the death penalty in a felony murder case does not offend Eighth Amendment principles where the defendant is a major participant in the underlying felony and acted with a reckless indifference to human life. (*Tison v. Arizona, supra*, 481 U.S. at p. 158.)

Penal Code section 190.2, subdivision (d), provides for imposition of the death penalty for,

> every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person or persons.

This section conforms to the requirements of the Eighth Amendment as set forth in *Edmund* and *Tison*. (*Tapia v. Superior Court, supra*, 53 Cal.3d 282, 298, fn. 16.)

Both the guilt phase and penalty phase retrial jurors were instructed according to CALJIC No. 8.80.1 that, with respect to the felony murder special

circumstances, Clark must have been a major participant in the underlying felonies and acted with reckless indifference to human life, defined as being when "the defendant knows or is aware that his acts involve a grave risk of death to an innocent human being." (7 CT 2747; 13 CT 4854.)

There is ample evidence that, although not the actual killer of Kathy Lee, Clark was both a major participant in the attempted robbery and burglary at the Comp USA store and acted with reckless indifference to human life to support the jury's true findings as to the felony murder special circumstances.

Although neither this Court nor the United States Supreme Court has specifically defined the term "major participant," the Court of Appeal has held that, in the context of Penal Code section 190.2, subdivision (d), "the phrase 'major participant' is commonly understood and is not used in a technical sense peculiar to the law." (*People v. Proby* (1998) 60 Cal.App.4th 922, 933.) As the Court of Appeal noted, "[t]he common meaning of 'major' includes 'notable or conspicuous in effect or scope' and 'one of the larger or more important members or units of a kind or group.'" (*Id.* at pp. 933-934.)

Clark mischaracterizes his role as "acting as the 'getaway driver.'" (AOB 508.) The evidence clearly shows that Clark's involvement extended well beyond that of a "getaway driver." Moreover, even if Clark was merely a "getaway driver," it would be a sufficient basis for concluding he was a major participant because that role would be integral to the crime. A "major participant" is someone who is an active participant in planning or carrying out the crime- someone who intentionally assumes some responsibility for the actual successful commission of the crime. Principals and aiders and abettors whose conduct is integral to the crime, e.g., a lookout or getaway driver, are major participants. (*People v. Hearn* (2002) 95 Cal.App.4th 1163, 1176.)

Clark was unquestionably a major participant in the attempted robbery and burglary of the Comp USA store. Clark was the mastermind and driving force behind the crimes. Clark cased the Comp USA store, studying the

numbers and movements of employees and their activities around closing time. (50 RT 8751-8758.) He helped Jeanette Moore to obtain a false driver's license with which to rent the U-Haul truck that was prepositioned near the Comp USA store for use in the crimes. (43 RT 7645-7646, 7649-7654, 7667-7677, 7679-7683, 7714, 7720-7721; 45 RT 7869-7897; 49 RT 8630-8632; 50 RT 8758-8764.)

Clark also assembled a group of individuals to assist in removing the merchandise from the Comp USA store at the Del Taco restaurant nearby, including his brother and Matthew Weaver. Clark was driving his BMW toward the north side of the Comp USA store when the arrival of the police forced him to flee. (45 RT 8007-8012, 8023-8029; 46 RT 8044-8056.) Clark's connection to Nokkuwa Ervin, who fired the shot that killed Kathy Lee, was demonstrated by the fact that Ervin sought to evade the police by jumping in Clark's car. (45 RT 7931-7933.)

Although Clark did not fire the fatal shot that took the life of Kathy Lee, he was not only a major, but a critical, participant in the underlying attempted robbery and burglary, setting in motion the events that led to Lee's murder. The crimes literally could not have occurred without Clark's participation and this is sufficient to support the jury's finding that he was a major participant in the underlying offenses. (See *People v. Marshall*, *supra*, 50 Cal.3d at p. 938 ["ringleader"of burglary/robbery properly found to be major participant, even though not actual killer].)

Similarly, there was substantial evidence to support the jury's finding that Clark acted with reckless indifference to human life. Under *Tison*, "the culpable mental state of 'reckless indifference to life' is one in which the defendant 'knowingly engag[es] in criminal activities known to carry a grave risk of death.'" (*People v. Estrada*, *supra*, 11 Cal.4th at p. 577; see also CALJIC No. 8.80.1.) Based on Clark's meticulous planning of every aspect of the Comp USA robbery, the jury could only conclude that he was subjectively

aware of how Ervin was to subdue the store employees in order to gain access to the merchandise inside, namely with the gun and handcuffs. It could not have escaped Clark's notice that such a plan would create a grave risk that someone would be harmed during the robbery's execution, whether intentionally or by accident or misadventure.

"Participants in violent felonies like armed robberies can frequently 'anticipat[e] that lethal force . . . might be used . . . in accomplishing the underlying felony.'" (*Tison v. Arizona*, *supra*, 481 U.S. at pp. 150-151; see also *People v. Bland* (1995) 10 Cal.4th 991, 996 [potential for death or injury results from the very presence of a firearm during commission of crime].) The very real possibility that someone would be harmed during the course of the robbery was simply a calculated risk that Clark was prepared to take in conceiving and executing the planned robbery.

Clark also contends that there was insufficient evidence that he intended to kill Williams. (AOB 509-511.) The jury found Clark guilty of first degree premeditated murder in the killing of Williams. (8 CT 2778.) The mental state required to support a finding of first degree premeditated murder is "a deliberate and premeditated intent to kill with malice aforethought." (*People v. Hart* (1999) 20 Cal.4th 546, 608.) The evidence amply supports the jury's finding that Clark harbored an intent to kill Ardell Williams.

In arguing that there is insufficient evidence that Clark had the intent to kill Williams, he ignores his own statements to Williams's sister that if Williams testified against him it would "just kinda like wipe me out" and that she "could come to court and get complete amnesia." (14 CT 5361, 5387.) Clark similarly told Alonzo Garrett that Williams "could put me away." (56 RT 9715.)

He also ignores the extensive evidence implicating Yancey in Williams's murder and demonstrating a conspiracy between the two to commit the murder. Yancey visited Clark at the Orange County Jail shortly after Williams's murder. (60 RT 10155.) Yancey's phone records for the period of January through

March 1994 indicated numerous calls to Clark's attorney, his investigator, a pay phone in the Orange County Jail accessible to Clark, and to Ardell Williams's home. (60 RT 10156-10157.) Based on all of this evidence, the jury could reasonably conclude that Clark intended to murder Williams to prevent her from testifying against him in the Comp USA case.

L.

THE TRIAL COURT PROPERLY DENIED CLARK'S PENAL CODE SECTION 987.9 APPLICATION FOR FUNDS TO HIRE A POLYGRAPH EXPERT WHO WOULD ADMINISTER A POLYGRAPH EXAMINATION TO CLARK BECAUSE THE EXPERT'S TESTIMONY WAS INADMISSIBLE UNDER BOTH EVIDENCE CODE SECTION 351.1 AND THE HEARSAY RULE AND THEREFORE NOT REASONABLY NECESSARY TO CLARK'S DEFENSE

Clark contends that the trial court's denial of an application for funds to obtain a defense polygraph expert who would administer a polygraph examination to Clark, violated Penal Code section 987.9 and his federal constitutional rights to due process, effective assistance of counsel, and a reliable penalty determination. Clark claims that he made the necessary showing of scientific reliability to support introduction of polygraph results at the penalty phase retrial to support his arguments of lingering doubt and that Evidence Code section 351.1, providing for the exclusion of polygraph results, unconstitutionally interfered with his federal constitutional right to present a defense. (AOB 514-533.) The trial court properly denied the application for funds because the results of a polygraph exam would be inadmissible at trial both under Evidence Code section 351.1 and the statutory prohibition against hearsay.

Penal Code section 987.9, subdivision (a) provides:

> In the trial of a capital case or a case under subdivision (a) of Section 190.05 the indigent defendant, through the defendant's counsel, may request the court for funds for the specific payment of investigators, experts, and others for the preparation or presentation of the defense. The application for funds shall be by affidavit and shall specify that the funds are reasonably necessary for the preparation or presentation of the defense. The fact that an application has been made shall be confidential and the contents of the application shall be confidential. Upon receipt of an application, a judge of the court, other than the trial judge presiding over the case in question, shall rule on the reasonableness of the request and shall disburse an appropriate amount of money to the defendant's attorney. The ruling on the reasonableness of the request shall be made at an in camera hearing. In making the ruling, the court shall be guided by the need to provide a complete and full defense for the defendant.

Penal Code section 987.9 is intended to protect the federal and state constitutional rights of an indigent defendant to the effective assistance of counsel, which "includes the right to reasonably necessary defense services." (*People v. Blair*, *supra*, 36 Cal.4th at pp. 732-733, quoting *Corenevsky v. Superior Court* (1984) 36 Cal.3d 307, 319-320.) It is the defendant's burden to demonstrate the need for the services being requested. (*People v. Guerra*, *supra*, 37 Cal.4th at p.1085.) The right to ancillary services is only implicated "when a defendant demonstrates such funds are 'reasonably necessary' for his or her defense by reference to the general lines of inquiry that he or she wishes to pursue." (*People v. Blair*, *supra*, 36 Cal.4th at p. 733.)

"'Section 987.9 commits to the sound discretion of the trial court the determination of the reasonableness of an application for funds for ancillary services.'" (*People v. Box* (2000) 23 Cal.4th 1153, 1184, quoting *People v. Mattson* (1990) 50 Cal.3d 826, 847.) A trial court's denial of an application for funds for ancillary services will only be disturbed on appeal upon a showing that the trial court abused its discretion. (*People v. Alvarez*, *supra*, 14 Cal.4th at p. 234.)

The trial court did not abuse its discretion in denying Clark's application for funds to obtain the services of a polygraph expert who would administer a polygraph examination to Clark and then testify regarding the results of that examination at the penalty phase retrial to support Clark's arguments of lingering doubt. A grant of ancillary funds can be denied when the evidence sought to be obtained by the funds will not be admitted into evidence by the trial court. (See *People v. Daniels* (1991) 52 Cal.3d 815, 877.) Clark's application for funds was properly denied because a polygraph expert was not reasonably necessary to Clark's defense, since the results of a polygraph examination of Clark as well as the opinion of the examiner would have been inadmissible under Evidence Code section 351.1. Accordingly, Clark's claim hinges on his challenge to the constitutionality of Evidence Code section 351.1. As will be demonstrated below, that claim must fail.

Evidence Code section 351.1, subdivision (a) provides:

> Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, or any reference to an offer to take, failure to take, or taking of a polygraph examination, shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and hearings, or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results.

Pursuant to Evidence Code section 351.1, polygraph evidence is categorically inadmissible in criminal cases absent the stipulation of the parties. (*People v. Wilkinson* (2004) 33 Cal.4th 821, 845-846.) The exclusion of polygraph evidence in Evidence Code section 351.1 is applicable to the penalty phase of a capital trial. (*People v. Koontz*, *supra*, 27 Cal.4th at p. 1090.) Clark nonetheless contends that the categorical exclusion of polygraph evidence violated his constitutional right to present a defense. (AOB 522-533.)

As a preliminary matter, Clark cannot challenge the constitutionality of Evidence Code section 351.1 and its prohibition on the admission of polygraph

evidence because, as the trial court noted in its order denying Clark's request for funds (11 CT 4241), he failed to make an adequate offer of proof that polygraph evidence is generally accepted in the scientific community as required under *People v. Kelly* (1976) 17 Cal.3d 24, and *Frye v. United States* (D.C. Cir. 1923) 293 F. 1013 (hereinafter *Kelly/Frye*). While Clark's offer of proof indicated acceptance of the polygraph's reliability in the community of polygraph examiners, there was no indication of acceptance in the larger scientific community. (11 CT 4242-4250; 13 CT 4312-4353.) Such an offer of proof is a prerequisite to any constitutional attack on Evidence Code section 351.1. (See *People v. Wilkinson*, *supra*, 33 Cal.4th at p. 847.)

However, even assuming Clark's offer of proof were adequate to meet the *Kelly/Frye* standard, his challenge to Evidence Code section 351.1 would not succeed. As this Court noted,

> we never have suggested that evidence that satisfies the *Kelly/Frye* test must, as a constitutional matter, be admitted in evidence notwithstanding the statutory provision barring such admission.

(*People v. Wilkinson*, *supra*, 33 Cal.4th at p. 848.)

As this Court concluded in rejecting an identical challenge to the constitutionality of Evidence Code section 351.1, "a 'per se rule excluding polygraph evidence is a "rational and proportional means of advancing the legitimate interest in barring unreliable evidence." [Citation.'" (*People v. Wilkinson*, *supra*, 33 Cal.4th at pp. 849-850.) In doing so, this Court noted that "'the scientific community remains extremely polarized about the reliability of polygraph techniques.' [Citation.]" (*Id.* at p. 850.)

The penalty phase of Clark's trial wherein he sought to introduce polygraph evidence took place in late 1997. The defendant in *Wilkinson* committed the charged offenses in early 1999, i.e. after Clark's trial. (*Id.* at p. 828.) This Court observed that the defendant in *Wilkinson*,

> cannot persuasively contend that between the time of the [United States Supreme Court's] *Scheffer* decision and defendant's trial, a span of two

> and one-half years, the deep division in the scientific and legal communities regarding the reliability of polygraph evidence, as recognized by *Scheffer*, had given way to a general acceptance that would render the categorical exclusion of polygraph evidence "so arbitrary or disproportionate that it is unconstitutional."

(*People v. Wilkinson*, *supra*, 33 Cal.4th at p. 850.)

Similarly, Clark cannot reasonably contend that the state of acceptance of polygraph evidence in the scientific community was at a more advanced state at the time of his penalty phase retrial in late 1997 than in 1999 when the defendant in *Wilkinson* failed to make the same showing.[47/] Evidence Code section 351.1's categorical exclusion of polygraph evidence is constitutional.

Clark's claim that Evidence Code section 351.1 deprived him of his constitutional right to present a defense, relying on *Rock v. Arkansas* (1987) 483 U.S. 44 [107 S.Ct. 2704, 97 L.Ed.2d 37] and *Chambers v. Mississippi* (1973) 410 U.S. 284 [93 S.Ct. 1038, 35 L.Ed.2d 297] (AOB 522-533), was similarly rejected by this Court in *Wilkinson*. As this Court noted,

> *Scheffer* distinguished *Rock* and *Chambers*, finding that "unlike the evidentiary rules at issue in those cases, [the rule excluding polygraph evidence] does not implicate any significant interest of the accused." [Citation.]

(*People v. Wilkinson*, *supra*, 33 Cal.4th at p. 851.)

There was an additional problem with Clark's proposed use of polygraph evidence that, while not remarked on by the trial court, would have precluded admissibility of the evidence independent of Evidence Code section 351.1 and

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47. Although *Wilkinson* does not make clear on what date the defendant offered evidence of the acceptance of polygraph evidence in the scientific community, the charged offenses were committed in February of 1999 and the evidence could not have been offered prior to that date. Further, this Court noted a two-and-a-half-year span of time between the decision of the United States Supreme Court in *United States v. Scheffer* (1998) 523 U.S. 303 [118 S.Ct. 1261, 140 L.Ed.2d 413], indicating the offer of proof in *Wilkinson* could have been made as late as 2000. (*People v. Wilkinson*, *supra*, 33 Cal.4th at p. 850.)

therefore rendered Clark's application for ancillary services unnecessary. Clark has never explained how evidence of the truthfulness of his statements to the examiner would be admissible. Evidence Code section 1200, subdivision (a) defines hearsay as an out-of-court statement offered to prove the truth of the matter asserted. (*People v. Crew*, *supra*, 31 Cal.4th at p. 841.) Hearsay statements are inadmissible unless an exception to the hearsay rule applies. (Evid. Code, § 1200, subd. (b); *People v. Hardy*, *supra*, 2 Cal.4th at p. 139.)

Any statements made by Clark to the examiner would be inadmissible hearsay and not subject to any hearsay exception. Accordingly, the polygraph examiner would be unable to testify to the contents of any polygraph examination of Clark because the statements of Clark made during the polygraph examination would be offered for their truth, i.e. that he was not involved in the crimes. Therefore, the examiner's opinion that Clark was truthful during the exam would be wholly lacking in both foundation and relevance because the hearsay rule would prohibit the examiner from testifying to what Clark said during the exam.

Indeed, in both *Sheffer* and *Wilkinson*, the defendants testified at trial as to their innocence and then sought to introduce polygraph evidence to bolster their credibility. (*Id.* at pp. 851-852.) Presumably, had the polygraph evidence been admissible under Evidence Code section 351.1, the defendants' statements would have also been admissible as prior consistent statements under Evidence Code section 1236. However, as Clark did not testify and there is no suggestion in the record that the prohibition against polygraph evidence was the basis for his not testifying or that he would have testified had polygraph evidence been otherwise ruled admissible, the polygraph evidence would have been independently inadmissible as hearsay even independent of Evidence Code section 351.1.

This analysis remains the same even though Clark's proffer was for the purpose of presenting evidence of lingering doubt in the penalty phase. (AOB

514-515.) As previously noted, Evidence Code section 351.1 foreclosing admissibility of polygraph evidence applies to the penalty phase of a capital trial. (*People v. Koontz*, *supra*, 27 Cal.4th at p. 1090.) Moreover, evidence that is inadmissible to raise a reasonable doubt in the guilt phase is inadmissible to raise lingering doubt at the penalty phase. (*People v. Stitely*, *supra*, 35 Cal.4th at p. 556.) Further, evidence that is intended to create a reasonable doubt as to a defendant's guilt at the penalty phase has no relevance to the circumstances of the offense or the defendant's character and record. While a defendant may argue lingering doubt as a reason not to impose the death penalty, he may not retry the guilt phase in an effort to create lingering doubt. (*In re Gay* (1998) 19 Cal.4th 771, 814.) In other words, Clark's desire to pursue a lie detector test had more impediments to admissibility than Evidence Code section 351.1 and *Kelly/Frye*.

Accordingly, because Clark's application for ancillary services was for an expert who would provide inadmissible evidence, the trial court did not abuse its discretion in finding that the Penal Code section 987.9 funds were not reasonably necessary to Clark's defense. (See *People v. Alvarez*, *supra*, 14 Cal.4th at p. 234.)

LI.

THE TRIAL COURT PROPERLY DENIED CLARK'S MOTION TO COMPEL THE PROSECUTION TO STIPULATE TO AN INTIMATE RELATIONSHIP BETWEEN CLARK AND YANCEY BECAUSE A STIPULATION WOULD HAVE DEPRIVED THE PROSECUTION'S CASE OF ITS PERSUASIVENESS AND FORCEFULNESS

Clark contends that it was improper for the trial court not to require the prosecution to accept Clark's proposed stipulation to a "close personal relationship" between Clark and Yancey at the penalty phase retrial and

allowing the prosecution to introduce sexually explicit letters between Yancey and Clark to establish the nature and character of their relationship. (AOB 534-538.) However, the trial court properly denied the motion, recognizing that offering a stipulation in place of the letters would deprive the prosecution's case of its full impact and forcefulness.

As discussed in Argument XXVII, *ante*, which is incorporated herein by reference,

> [t]he general rule is that the prosecution in a criminal case cannot be compelled to accept a stipulation if the effect would be to deprive the state's case of its persuasiveness and forcefulness. [Citations.]

(*People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1007; accord, *People v. Sakarias*, *supra*, 22 Cal.4th at p. 629; *People v. Scheid*, *supra*, 16 Cal.4th at pp. 16-17; *People v. Arias*, *supra*, 13 Cal.4th at p. 131; *People v. Garceau*, *supra*, 6 Cal.4th at p. 182, abrogated on other grounds in *People v. Yeoman*, *supra*, 31 Cal.4th at pp. 117-118.) This includes circumstances where a defendant's offer to stipulate is "'ambiguous in form or limited in scope . . .' the evidence retains some probative value and is admissible. [Citation.]" (*People v. Hall*, *supra*, 28 Cal.3d at p. 153; see also, e.g., *People v. Bonin*, *supra*, 47 Cal.3d at p. 848 [offer to stipulate to only part of testimony properly refused]; *Old Chief v. United States*, *supra*, 519 U.S. at pp. 186-187 ["a criminal defendant may not stipulate or admit his way out of the full evidentiary force of the case as the Government chooses to present it."].)

At the penalty phase retrial, Clark sought "an order compelling the prosecution to accept [Clark's stipulation] that [Clark] and Antoinette Yancey had a close personal relationship" and to exclude all correspondence between Clark and Yancey as irrelevant. (12 CT 4475-4487.) The trial court denied the motion, explaining,

> I did peruse the letters, actually read them and agree with [the prosecutor] on the letters issue. I mean, [Clark] is inside; he is in jail and he is getting somebody to do an awful deed.

> And stipulations is [sic] just not going to do what the People think they have to prove. So I have to agree with [the prosecutor] on that.

(73 RT 12428.)

The trial court correctly concluded that offering a stipulation to an intimate relationship in lieu of the letters between Clark and Yancey would rob the prosecution's case of its forcefulness. As discussed in Argument XXVII, *ante*, the letters showed much more than a mere close or intimate relationship between the two. The prosecution's theory of the case was that Clark, who was incarcerated at the Orange County Jail, conspired with, and somehow persuaded Yancey to arrange Ardell Williams's murder. Yancey's participation in Williams's murder could not easily be explained by merely a close or intimate relationship with Clark, which Clark claims he was willing to stipulate to. It would have been improper to compel the prosecution to accept a stipulation to a close or intimate relationship between Clark and Yancey as it would have deprived the prosecution's case and theory of motive of its "persuasiveness and forcefulness." (See *People v. Edelbacher*, *supra*, 47 Cal.3d at p. 1007.)

LII.

SUBSTANTIAL EVIDENCE SUPPORTS THE JURY'S FINDINGS THAT CLARK WAS A MAJOR PARTICIPANT IN THE COMP USA CRIMES AND ACTED WITH RECKLESS INDIFFERENCE TO HUMAN LIFE

Clark contends there was insufficient evidence that he was a major participant in the underlying burglary and attempted robbery of the Comp USA store and acted with reckless indifference to human life to support the felony murder and multiple murder special circumstances.[48] As discussed in

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48. The felony murder special circumstance (Pen. Code, § 190.2, subd. (a)(3)) does not require that the defendant intend to kill each victim, so long as he intended to kill a victim. (*People v. Dennis* (1998) 17 Cal.4th 468, 516.) It

Argument IL, *ante*, which is incorporated herein by reference, there was ample evidence supporting the jury's findings that Clark was a major participant in the underlying burglary and attempted robbery of the Comp USA store and acted with reckless indifference to human life to support the felony murder special circumstances. Clark's claim is without merit.

LIII.

THERE IS SUBSTANTIAL EVIDENCE THAT YANCEY UTILIZED THE JANET JACKSON RUSE TO CONCEAL HER PURPOSE IN LURING WILLIAMS TO THE CONTINENTAL RECEIVING LOT AND, WHILE WILLIAMS FILLED OUT THE JOB APPLICATION FORMS, ENGAGED IN A PERIOD OF WATCHFUL WAITING TO MANEUVER INTO A POSITION BEHIND WILLIAMS TO DELIVER THE FATAL SHOT AT AN OPPORTUNE MOMENT, THEREBY SUPPORTING THE JURY'S FINDING OF THE LYING-IN-WAIT SPECIAL CIRCUMSTANCE TO BE TRUE

Clark contends that there is insufficient evidence to support the true finding as to the lying-in-wait special circumstance because there was no evidence that Yancey engaged in a substantial period of watchful waiting before murdering Williams. (AOB 545-550.) However, the evidence amply supports the inference that Yancey used the Janet Jackson ruse to conceal her purpose in luring Williams to the Continental Receiving lot for a bogus job interview and, while Williams filled out job application forms, Yancey engaged in a period of watchful waiting during which she maneuvered behind Williams to deliver the fatal shot at an opportune moment.

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is sufficient that, as discussed in Argument IL, *ante*, there was substantial evidence that Clark had an intent to kill Ardell Williams and acted with reckless indifference to human life in the murder of Kathy Lee in order to support the multiple murder special circumstance. (See *People v. Dennis*, *supra*, at p. 516.)

When determining whether substantial evidence supports a special circumstance finding, a reviewing court considers the evidence "in the light most favorable to the prosecution" to determine whether "any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt." (*People v. Dickey*, *supra*, 35 Cal.4th at p. 903.)

> The lying-in-wait special circumstance requires proof of "an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage." [Citations.]

(*People v. Jurado* (2006) 38 Cal.4th 72, 119.)

There was ample evidence presented at trial from which the jury could reasonably find the lying-in-wait special circumstance to be true. As discussed previously, there was overwhelming circumstantial evidence that Yancey and Clark plotted Williams's murder while Clark was an inmate in the Orange County Jail in order to prevent Williams from testifying against Clark in the Comp USA case.

Yancey engaged in a lengthy and complicated deception in order to lure Williams to her death, first by posing as a flower delivery person to gain access to the Williams's home and then by telephoning Williams's mother and claiming to be Janet Jackson, a friend of Williams's sister Liz Fontenot. Yancey used the Janet Jackson ruse to ingratiate herself with Williams's mother, pretending that she had a daughter who had cancer to elicit sympathy. (54 RT 9440-9470; 55 RT 9583-9594.) It was only after gaining Williams's mother's trust that Yancey told her about the fictitious job interview at Continental Receiving. (53 RT 9314-9321; 54 RT 9449-9470.) It was during the job interview at Continental Receiving that Williams was shot in the back of the head. (54 RT 9471-9472; 55 RT 9548-9549; 56 RT 9752-9754.)

Yancey's Janet Jackson ruse and bogus job interview were designed to conceal the true purpose of luring Williams to Continental Receiving: her murder. The jury could infer from the recovery of the partially completed job application forms near Williams's body (54 RT 9521-9526) that some substantial period of time elapsed while Williams filled out the forms, during which time Yancey waited for an opportune moment to strike. Finally, the location of the fatal shot, behind Williams's left ear, indicated that Yancey utilized the distraction created by the job application forms to position herself behind Williams and fire the fatal shot without warning, depriving Williams of the opportunity to either escape or defend herself. Substantial evidence supported the true finding as to the lying-in-wait special circumstance. (See *People v. Jurado, supra*, 38 Cal.4th at p. 119.)

Clark's reliance on *Richards v. Superior Court* (1983) 146 Cal.App.3d 306 is misplaced. (AOB 546-547.) In *Richards*, the defendants lured the victim into a garage and murdered him without "any period of watchful waiting." (*People v. Morales* (1989) 48 Cal.3d 527, 556, original italics, citing *Richards v. Superior Court, supra*, at pp. 314-316.) Moreover, this Court rejected the holding in *Richards* insofar that the lying-in-wait special circumstance required "actual physical concealment." (*People v. Morales, supra*, 48 Cal.3d at p. 557.)

Unlike in *Richards*, there is ample evidence of a period of watchful waiting in this case. Again, the discovery of the partially completed job application forms near Williams's body permitted the inference that she spent some period of time at the Continental Receiving lot filling out the forms while Yancey positioned herself behind Williams to deliver the fatal shot. This factual scenario is analogous to those in *Jurado*, *Combs*, and *Morales*, where the defendants lured their victims into the front seat of a car and, after driving to a convenient location, murdered the victims from the back seat. (See *People*

v. Jurado, *supra*, 38 Cal.4th at p. 120; *People v. Combs* (2004) 34 Cal.4th 821, 853; *People v. Morales*, *supra*, 48 Cal.3d at p. 554.)

The element of concealment of purpose is met by showing the "true intent and purpose were concealed by [] actions or conduct." (*People v. Moon, supra*, 37 Cal.4th at p. 22.) There is no requirement that Yancey have been literally concealed from view before attacking Williams. (*Ibid.*; *People v. Hillhouse* (2002) 27 Cal.4th 469, 500.) It is the creation of a situation that enabled Yancey to take Williams unaware even though she could see Yancey. (*People v. Morales*, *supra*, 48 Cal.3d at p. 555.) The evidence fully supports the reasonable inference that there was a substantial period of watching and waiting by Yancey while Williams filled out a job application. Substantial evidence supports the jury's finding.

LIV.

ARDELL WILLIAMS DID NOT HAVE TO PERSONALLY WITNESS THE COMP USA ROBBERY AND MURDER OF KATHY LEE IN ORDER TO BE A WITNESS WITHIN THE MEANING OF PENAL CODE SECTION 190.2, SUBDIVISION (A)(10)

Clark contends that the murder of a witness special circumstance under Penal Code section 190.2, subdivision (a)(10) should have been dismissed because Ardell Williams was not a witness to the Comp USA robbery and murder. (AOB 551-555.) However, this Court has consistently rejected the identical claim and should do so here.

Penal Code section 190.2, subdivision (a)(10) provides for a sentence of death or life in prison without parole for a murderer where

> [t]he victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in

retaliation for his or her testimony in any criminal or juvenile proceeding. As used in this paragraph, "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code.

As this Court has observed,

nothing in the language of [Penal Code section 190.2, subdivision (a)(10)] or in our decisions applying this special circumstance supports the suggestion that the special circumstance is confined to the killing of an "eyewitness," as opposed to any other witness who might testify in a criminal proceeding.

(*People v. Jones*, *supra*, 13 Cal.4th at p. 550; see also *People v. San Nicolas* (2004) 34 Cal.4th 614, 656; *People v. Jenkins*, *supra*, 22 Cal.4th at pp. 931-933, 1018 [investigating officer murdered to prevent him from testifying in defendant's robbery trial].) Clark fails to address the many prior decisions of this Court rejecting his contention. This Court has previously rejected the identical argument and Clark provides no basis for departing from the repeated rejection of his contention.

LV.

PENAL CODE SECTION 654 DID NOT BAR THE JURY FROM CONSIDERING BOTH THE ROBBERY-MURDER AND BURGLARY-MURDER SPECIAL CIRCUMSTANCES

Clark contends that Penal Code section 654 prohibited the jury from considering both the robbery-murder and burglary-murder special circumstances since both related to the same course of conduct at the Comp USA store. (AOB 556-559.) However, this Court has consistently rejected the identical claim and should do so here.

Penal Code section 654 pertinently provides:

(a) An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that

provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision.

However, this Court has repeatedly held that section 654 does not bar the jury in a capital case from considering both robbery-murder and burglary-murder special circumstances, even where the multiple special circumstances were part of the same course of criminal conduct. (*People v. Sanders*, *supra*, 51 Cal.3d at pp. 528-529; *People v. Bean* (1988) 46 Cal.3d 919, 954-955; *People v. Melton*, *supra*, 44 Cal.3d at pp. 765-769.) As this Court explained,

> "any robbery and burglary committed by defendant in the course of his homicidal conduct could properly be considered an independent aggravating factor. Each involved violation of [a] distinct interest that society seeks to protect, and a defendant who commits both offenses in the course of a murder may be deemed more culpable than a defendant who commits only one."

(*People v. Sanders*, *supra*, 51 Cal.3d at p. 529, quoting *People v. Bean*, *supra*, 46 Cal.3d at pp. 954-955.) Clark fails to address the prior decisions of this court rejecting his argument or offer any reason for this Court to revisit its decisions in *Sanders*, *Melton*, and *Bean*. This Court has previously rejected the identical argument and should do so here.

LVI.

THE EVIDENCE OF CLARK'S INVOLVEMENT IN THE 1990 SOFT WAREHOUSE BURGLARY WAS PROPERLY ADMITTED TO DEMONSTRATE THE RELATIONSHIP BETWEEN CLARK AND WILLIAMS AND CLARK'S MOTIVE TO MURDER WILLIAMS TO REBUT CLARK'S ARGUMENT OF LINGERING DOUBT AS TO HIS GUILT

Clark contends that the trial court improperly admitted irrelevant evidence at the penalty phase retrial that Clark was involved with Ardell Williams in a burglary at a Soft Warehouse store in 1990. (AOB 560-563.)

However, the evidence was properly admitted to demonstrate the relationship between Clark and Williams and Clark's motive to murder Williams to prevent her from testifying in the Comp USA case to rebut Clark's argument of lingering doubt as to his guilt.

As discussed in Argument X, *ante*, which is incorporated herein by reference, only relevant evidence is admissible. (Evid. Code, § 350; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 995.) Relevant evidence is defined as,

> evidence, including evidence relevant to the credibility of a witness . . ., having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.

(Evid. Code, § 210; *People v. Cunningham*, *supra*, 25 Cal.4th at p. 995.)

A trial court has broad discretion to determine the relevance of evidence and its exercise of discretion "is not grounds for reversal unless ' "the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." ' [Citations.]" (*People v. Ochoa*, *supra*, 26 Cal.4th at pp. 437-438; see also *People v. Cunningham*, *supra*, 25 Cal.4th at p. 995.)

At the penalty phase retrial, Clark filed a motion in limine to exclude any reference to the Soft Warehouse burglary perpetrated by Clark and Ardell Williams in 1990 as being irrelevant to the penalty determination under Penal Code section 190.3, subdivision (b) and (c), and as being unduly prejudicial under Evidence Code section 352. (12 CT 4386-4391, 4557-4566.) The prosecution responded that the evidence was relevant to show Clark's relationship with Williams and motive to murder her to prevent her from testifying against him in the Comp USA case and thereby rebut Clark's argument of lingering doubt. (12 CT 4604-4605.)

At the hearing on the motion, the prosecution explained that the evidence of the Soft Warehouse burglary was not being offered pursuant to Penal Code section 190.3, subdivisions (b) and (c). (73 RT 12278-12281.)

Instead, the prosecution sought to introduce it pursuant to Penal Code section 190.3, subdivision (a) as evidence in aggravation relating to the circumstances of Williams's murder. The relationship between Clark and Williams tended to establish his motive to murder Williams to prevent her from testifying, thereby rebutting Clark's argument of lingering doubt. (73 RT 12410-12412.)

The trial court found the evidence to be inadmissible under Penal Code section 190.3, subdivision (a) as evidence in aggravation, but admitted the evidence as relevant evidence of motive to rebut Clark's argument of lingering doubt. (73 RT 12416-12420.)

At the penalty phase retrial, Richard Highness, a Soft Warehouse salesperson, testified that Ardell Williams was a cashier at the Soft Warehouse store in Torrance in 1990 when Clark came to the store to buy $10,000 worth of computer equipment, which Williams allowed him to take without paying. (81 RT 14040-14052.)

When determining the penalty in a capital case, a jury may consider whether there is any lingering doubt as to the defendant's guilt. (*People v. Harrison*, *supra*, 35 Cal.4th at p. 255.) The trial court instructed the jury at the penalty phase retrial, at Clark's request, that it could consider lingering doubt of Clark's guilt as mitigation. (13 CT 4858.) Lingering doubt was the principle argument in mitigation that Clark made to the jury. (90 RT 16541-16567, 16570-16656, 16666-16669.) Lingering doubt as to Clark's guilt was therefore one of the contested issues at the penalty phase retrial. Accordingly, evidence of guilt, such as evidence that Clark and Williams had previously been involved in criminal activity together which lent credibility to her statements to the police and the grand jury regarding Clark's masterminding of the Comp USA robbery, testimony Clark sought to prevent by arranging her murder, was relevant to

rebut Clark's argument of lingering doubt.[49] (See *People v. Blair*, *supra*, 36 Cal.4th at pp. 750-751; see also *People v. Haskett* (1990) 52 Cal.3d 210, 242; *People v. Boyd* (1985) Cal.3d 762, 776.)

Even assuming the trial court improperly admitted evidence of the Soft Warehouse burglary, any error was harmless. A jury's penalty determination will not be disturbed on appeal based on the improper admission of evidence unless it is reasonably probable that the penalty determination would have been different had the evidence not been admitted. (See *People v. Combs*, *supra*, 34 Cal.4th at p. 861.) Here, the evidence relating to Clark's involvement in the Soft Warehouse burglary was limited to the testimony of one witness and amounted to a brief reference in an otherwise lengthy penalty phase retrial. The criminal conduct involved was relatively minor, particularly in comparison to the murders and other crimes of which Clark stood convicted. Further, the Soft Warehouse burglary was never mentioned by the prosecutor in argument. (90 RT 16469-16536.) There is simply no reasonable likelihood that, absent admission of the evidence of the Soft Warehouse burglary, Clark would have enjoyed a more favorable outcome. The evidence in aggravation was overwhelming in comparison to the circumstances in mitigation.

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49. Although Clark raised an Evidence Code section 352 challenge to the admission of the Soft Warehouse evidence (13 CT 4562-4564), Clark never sought, and the trial court never made, a ruling on Clark's objection. (73 RT 12416-12420.) Clark's failure to press for a ruling on the objection forfeits the claim on appeal. (See *People v. Morris*, *supra*, 53 Cal.3d at p. 190, overruled on other grounds, *People v. Stansbury*, *supra*, 9 Cal.4th at p. 830, fn. 1.)

LVII.

THE EVIDENCE OF THE SOFT WAREHOUSE BURGLARY WAS NOT OFFERED AS EVIDENCE IN AGGRAVATION AND WAS NOT SUBJECT TO THE STRICTURES OF PENAL CODE SECTION 190.3, SUBDIVISION (b)

Clark contends that evidence of Clark's participation with Ardell Williams in the Soft Warehouse burglary was improper under Penal Code section 190.3, subdivision (b), even though not offered as evidence in aggravation, because it did not involve force or violence.[50/] (AOB 564-566.) However, the evidence of the Soft Warehouse burglary was not offered as evidence in aggravation and was not subject to the strictures of Penal Code section 190.3, subdivision (b).

As discussed in Argument LVI, *ante*, evidence of Clark's involvement with Ardell Williams in the 1990 Soft Warehouse burglary was properly admitted to show the relationship between the two and to help establish Clark's motive to murder Williams in order to rebut Clark's argument of lingering doubt. Clark, however, claims that Penal Code section 190.3, subdivision (b), "controls even in a retrial and where the prosecutor asserts the basis of admissibility as lingering doubt." (AOB 565.) Clark's claim does not withstand scrutiny.

Penal Code section 190.3, subdivision (b) provides that, in making a penalty determination, the jury's consideration of prior unadjudicated criminal activity is limited to that conduct involving force or violence. (*People v. Boyd*, *supra*, 38 Cal.3d at pp. 772-776.) Clark correctly notes that the Soft Warehouse

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50. Clark again claims that the evidence should have been excluded under Evidence Code section 352. (AOB 565-566.) As discussed in Argument LVI, *ante*, Clark forfeited the claim by failing to press for a ruling in the trial court on his Evidence Code section 352 objection.

burglary did not involve force or violence of the threat of force or violence. (AOB 564.)

However, as this Court observed,

> "The *Boyd* rule does not apply to evidence presented at the guilt phase or by the defense. Rather, 'It stands for the proposition that the 1978 law prevents the prosecution from introducing, in its case-in-chief, aggravating evidence not contained in the various factors listed in section 190.3.' [Citation.]" [Citation.]

(*People v. Riel* (2000) 22 Cal.4th 1153, 1207.) As discussed in Argument XXXVII, *ante*, the evidence of the Soft Warehouse burglary was properly admitted in the guilt phase of the trial and was therefore not limited by Penal Code section 190.3.

Further, the statutory limitation recognized by this Court in *Boyd* is directed against the admission of unadjudicated, non-violent criminal conduct by the prosecution as evidence in aggravation. (See e.g. *People v. Boyd*, *supra*, 38 Cal.3d at pp. 772-776.) Penal Code section 190.3, subdivision (b)'s focus on evidence offered in aggravation is demonstrated by the policies recognized by this Court as underlying the subdivision:

> (a) that nonviolent misdemeanors are not important enough to be given any weight in deciding whether to impose a death penalty; and (b) that nonviolent felonies are entitled to some weight, but only if evidenced by a conviction - otherwise the time and trouble of proving the crime will outweigh its probative value.

(*Id.* at p. 774.)

Here, as discussed in Argument LVI, *ante*, the evidence of the Soft Warehouse burglary was not offered in aggravation at all, but to rebut Clark's lingering doubt argument offered in mitigation.

Shortly after the jury heard the testimony relating to the Soft Warehouse burglary at the penalty phase retrial, the trial court, at Clark's request (81 RT 14087-14096), cautioned the jury as follows:

> I wanted to give you an admonition concerning Software House [sic] evidence before we proceed, however. You are going to get other

instructions at the conclusion of the case which will help guide you in your deliberation process.

The evidence concerning the alleged theft from the Software House [sic], if believed, is being offered by the People for a limited purpose to show a criminal relationship, if any, between [Clark] and Ardell Williams. Okay? And is that clear to everybody?

So limited purpose, that means that is all you are allowed to consider it for if you believe it and accept it. If not, then it is not evidence to be considered. Fair enough?

(81 RT 14097.)

The Soft Warehouse burglary was never mentioned by the prosecutor in argument. (90 RT 16469-16536.) There is simply no basis in the record to conclude that the evidence was either offered or considered as justifying the imposition of Clark's death sentence.

This Court in *Boyd* expressly recognized that such evidence, while improper if offered in aggravation, could nonetheless be admissible to rebut mitigating evidence presented by the defendant under factor (k). (*People v. Boyd*, *supra*, 38 Cal.3d at p. 776.)

While this Court suggested in dicta that unadjudicated non-violent criminal activity would be relevant and admissible in rebuttal only after the defendant presented mitigating evidence (*Ibid.*), a position Clark advocated both in the trial court (73 RT 12418-12419) and on appeal, the issue of lingering doubt is of a different character than other mitigating factors. While the prosecution, in its case-in-chief, offered numerous witnesses who testified regarding the circumstances surrounding the murders of Kathy Lee and Ardell Williams under Penal Code section 190.3, subdivision (a), which permits evidence regarding the circumstances of the underlying offenses and special circumstance findings, Clark vigorously cross-examined those witness, attacking their credibility and the underlying evidence of his guilt. This was the foundation of his efforts at arguing lingering doubt as a factor in mitigation and

occurred throughout the prosecution's case-in-chief. Accordingly, the evidence requiring rebuttal was not presented through defense witnesses, but through the cross-examination of the witnesses called by the prosecution. The Soft Warehouse burglary evidence offered to bolster the credibility of Williams's statements to the police and the grand jury by establishing a pre-existing criminal relationship between Clark and Williams was therefore relevant and admissible in the prosecution's case-in-chief to rebut the attacks already launched by Clark in cross-examination.

As discussed in Argument LVI, *ante*, even assuming that it was improper to admit the evidence, it is not reasonably probable that absent the Soft Warehouse burglary evidence the jury's penalty decision would have been different. Similarly, Clark makes no showing that he was prejudiced by the presentation of the evidence in the prosecution's case-in-chief with an appropriate limiting instruction, rather than in rebuttal. Accordingly, any error was harmless.

LVIII.

THE EVIDENCE OF CLARK'S PARTICIPATION WITH ARDELL WILLIAMS IN 1990 SOFT WAREHOUSE BURGLARY PRESENTED AT THE PENALTY PHASE RETRIAL WAS NOT IMPROPER CHARACTER EVIDENCE

Clark contends that the trial court improperly admitted evidence of Clark's involvement with Ardell Williams in the Soft Warehouse burglary at the penalty phase retrial in violation of Evidence Code section 1101's prohibition against character evidence, the trial court's ruling in the guilt phase excluding such evidence, and Penal Code section 190.3. (AOB 567-577.) Clark never objected to the evidence under Evidence Code section 1101, and he has forfeited the claim on appeal. In any event, the evidence was offered not to show Clark's bad character, but to show a criminal relationship between Clark

and Williams, lending credibility to her statements to police and the grand jury regarding the Comp USA case and going to the prosecution's theory of motive as to her murder. The evidence was therefore admissible under Evidence Code section 1101, subdivision (b). Further, as discussed previously, the trial court never ruled the Soft Warehouse burglary evidence inadmissible at the guilt phase and Penal Code section 190.3 did not preclude the admission of the evidence.

Clark has forfeited his claim that admission of the Soft Warehouse evidence violated Evidence Code section 1101 by failing to object on this ground in the trial court. In order to preserve a claim that the introduction of character evidence violated Evidence Code section 1101, a defendant must make a timely and specific objection on that ground in the trial court. (Evid. Code, § 353; *People v. Guerra*, *supra*, 37 Cal.4th at p. 1117.) Although Clark objected to the Soft Warehouse evidence on a number of grounds, he never identified Evidence Code section 1101 as one of them. (12 CT 4386-4391, 4557-4566.) Accordingly, Clark's claim that the evidence was improper character evidence under Evidence Code section 1101 is forfeited. (See *Ibid.*)

As discussed at length in Argument XXXVII, *ante*, the evidence of the Soft Warehouse burglary was not ruled inadmissible by the trial court during the guilt phase and the record does not support Clark's contention to the contrary. Moreover, by showing that Clark had previously been involved in a computer store theft with Williams, it became clear why he would bring her with him to case the Comp USA store and thereby bolstered the credibility of the statement. It further explained why Williams's potential testimony was so dangerous to Clark and why he had a motive to murder her to prevent her from testifying. This was an appropriate purpose under Evidence Code section 1101, subdivisions (b) and (c). (See *People v. Douglas*, *supra*, 50 Cal.3d at p. 510 [prior act evidence admissible under 1101 to corroborate witness's testimony implicating defendant as perpetrator of murders], overruled on other grounds

in *People v. Marshall*, *supra*, 50 Cal.3d at p. 933, fn. 4.) Similarly, as discussed in Argument LVII, *ante*, and incorporated herein by reference the evidence was not prohibited under Penal Code section 190.3.

As discussed in Argument LVI, *ante*, and incorporated herein by reference, even assuming that it was improper to admit the evidence, it is not reasonably probable that Clark would have enjoyed a more favorable outcome if the Soft Warehouse burglary evidence had not been admitted. Accordingly, any error was harmless.

LIX.

THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE THAT, IF SENTENCED TO LIFE WITHOUT PAROLE, CLARK WOULD ALWAYS BE INCARCERATED IN A HIGH SECURITY FACILITY AS SPECULATIVE AND IRRELEVANT

Clark contends that the trial court improperly excluded evidence in mitigation offered at the penalty phase retrial through the testimony of Clark's sentencing expert that, if sentenced to life in prison without parole, Clark would always be housed in a high security facility. (AOB 578-588.) However, the trial court properly excluded the evidence as irrelevant and speculative, since it was impossible to know the security conditions of Clark's future incarceration and no evidence was offered that such security conditions would inhibit Clark from communicating with the outside world to plan and execute another murder like that of Ardell Williams.

While the Eighth and Fourteenth Amendments require that the jury at the penalty phase of a capital trial be permitted to consider all relevant mitigating evidence, the admissibility of such evidence is subject to the trial court's threshold determination of the relevance of the evidence. (*People v. Frye*, *supra*, 18 Cal.4th at p. 1015.) "[T]he concept of relevance as it pertains to mitigation evidence is no different from the definition of relevance as the term

is understood generally." (*Id.* at pp. 1015-1016, citing *McKoy v. North Carolina* (1990) 494 U.S. 433 [110 S.Ct. 1227, 108 L.Ed.2d 369].) " ' "Relevant mitigating evidence is evidence which tends logically to prove or disprove some fact or circumstance which a fact-finder could reasonably deem to have mitigating value. . . ." ' " (*People v. Frye, supra*, 18 Cal.4th at p. 1016.) A trial court retains discretion to determine the relevance of mitigating evidence and its admissibility in the penalty phase of a capital trial. (*Id.* at p. 1015.)

At the penalty phase retrial, the prosecution objected to the testimony of Norman Morein, a sentencing consultant and defense expert witness, insofar as his testimony would relate to Clark's security classification in state prison if sentenced to life without the possibility of parole. The prosecutor argued that such testimony was impermissibly speculative. (89 RT 16344.) The trial court held that Morein could testify regarding Clark's adaptability to a prison environment, but that testimony regarding the conditions of confinement was speculative and irrelevant. (89 RT 16346.)

Morein then testified at some length regarding the security classification system in state prison and the way in which inmates are classified for security purposes. (89 RT 16350-16364.) However, when asked "[c]an an LWOP prisoner ever get down to a level 2 or level 1 institution?," the prosecutor objected that the question called for speculation and the trial court sustained the objection. (89 RT 16364.) Clark's counsel then asked,

> Based upon your background, training and experience in the California Department of Corrections system, have you ever known of an LWOP prisoner making his way down to level 2 or level 1 institutions?

(89 RT 16364.)

The prosecutor objected to this question as irrelevant and the trial court sustained the objection. (89 RT 16364.)

Clark contends that it was improper to preclude him from introducing evidence that, if sentenced to life without the possibility of parole, he "would

be classified as a security level IV inmate and that he could not receive a reduced security level." (AOB 578.) He argues that such evidence was necessary to rebut the following argument of the prosecutor:

> What do we do with [Clark]? What do we do? This second murder he was across the street, you know, in these big thick concrete walls with bars. And you have heard testimony about how he is going to adapt to prison, about how he is a calming influence. What do we do? What do we as a society do? He has demonstrated that he has the ability - not only the ability, it happened, to orchestrate, to create, to enter into an agreement to murder somebody when he is in custody. And the person who got murdered was out of custody.
>
> And what is the punishment of life without [the] possibility of parole, how is the California Department of corrections going to stop that that [sic] the Orange County Jail could not? Phone calls. Visits with other inmates, kites, what?

(90 RT 16533-16534; AOB 579.)

First, as Clark acknowledges (AOB 580, fn. 49), this Court has previously held that evidence of the conditions in prison for an individual sentenced to life without the possibility of parole is irrelevant to mitigation, as it relates "neither to defendant and his background nor to the nature and circumstances of his crime." (*People v. Thompson* (1988) 45 Cal.3d 86, 139; see also *People v. Ray*, *supra*, 13 Cal.4th at p. 353.)

Clark argues that unlike the evidence rejected by this Court in *Thompson*, the evidence of the security under which Clark would be housed if sentenced to life without parole was not offered as mitigating evidence in and of itself, but to rebut the prosecutor's arguments of future dangerousness. (AOB 580.) In this sense, the evidence would be more akin to " 'evidence that the defendant would not pose a danger if spared (but incarcerated),' " which " '*must* be considered potentially mitigating.' " (See *People v. Ray*, *supra*, 13 Cal.4th at p. 353, emphasis in original.)

However, even though evidence to rebut claims of future dangerousness are relevant in mitigation, Clark ignores the second aspect of this Court's holding in *Thompson*, that,

> [d]escribing future conditions of confinement for a person serving life without possibility of parole involves speculation as to what future officials in another branch of government will or will not do.

(*People v. Thompson*, *supra*, 45 Cal.3d at p. 139.)

The evidence that was excluded by the trial court, specifically whether an inmate serving life without the possibility of parole could ever receive a lower security classification, required Clark's expert to engage in pure speculation. The witness had no way of knowing or even expressing an informed opinion as to Clark's potential security status in state prison during his entire period of incarceration. Administrative policies regarding the security classification of inmates could be altered. Future legislation could alter the conditions under which state prison inmates are incarcerated. Morein simply had no way of knowing the precise security situation Clark would be subjected to if sentenced to life without parole and any testimony on the point would be a guess and of no assistance to the trier of fact in assessing Clark's future dangerousness. Accordingly, the trial court properly rejected the evidence as unduly speculative. (See *Ibid.*)

Moreover, even assuming Morein could have opined as to Clark's future security status without engaging in rank and improper speculation, the opinion was still irrelevant to the subject of Clark's future dangerousness. Clark was convicted of conspiring to murder and murdering Ardell Williams while incarcerated in the Orange County Jail. The evidence indicated that he plotted the murder with Antoinette Yancey during her numerous visits to the jail and during lengthy conversations on the jail pay phones. Conspicuously absent from Morein's testimony was how being housed in a level 4 institution as an LWOP inmate would prevent Clark from engaging in similar acts. Clark made

no effort to offer any evidence that a level 4 institution would restrict Clark's communication with the outside world, such as by prohibiting mail, phone access, or visitation. (89 RT 16348-16364.) In the absence of such evidence explaining how Clark's potential security status in state prison would affect his ability to perpetrate crimes in the future like the murder of Ardell Williams, the evidence was irrelevant to the issue of Clark's future dangerousness.

Even assuming the trial court improperly excluded the evidence, any error was harmless beyond a reasonable doubt. The improper exclusion of mitigating evidence in the penalty phase of a capital trial is subject to the harmless error analysis articulated by the United States Supreme Court in *Chapman v. California*, *supra*, 386 U.S. at 24, and will not result in the reversal of the judgment where the error is harmless beyond a reasonable doubt. (*People v. Roldan*, *supra*, 35 Cal.4th at p. 739.)

As discussed above, there was considerable properly admitted evidence in aggravation. The question of Clark's future dangerousness was only one relatively minor aspect of the prosecutor's argument, which focused heavily on the circumstances of the offenses and, to a lesser extent, on Clark's prior criminal conduct. Further, the evidence proffered by Clark, that, in Morein's opinion, Clark would never be able to get into a level 1 or 2 facility, would not have rebutted the prosecution's argument of future dangerousness because it was impossible to guarantee that Clark would always be subject to the strictest security measures in state prison and there was no evidence that, even if he was permanently housed in a level 4 facility, that his ability to reach into the outside world to arrange crimes like the murder of Ardell Williams would be hampered in any way. Accordingly, any error in excluding the evidence was harmless beyond a reasonable doubt. (See *Ibid.*)

LX.

THE PROSECUTOR DID NOT ARGUE THAT ANTOINETTE YANCEY FIRED THE FATAL SHOT IN THE WILLIAMS MURDER AT THE PENALTY PHASE RETRIAL

Clark contends that the trial court improperly permitted the prosecutor to argue at the penalty phase retrial that Yancey was the actual shooter in the Williams murder, despite being collaterally estopped from making this argument based on the jury's finding in Yancey's murder trial that the special allegation that she personally used a firearm in Williams's murder was untrue. (AOB 589-593.) However, Clark ignores the fact that the trial court granted his in limine motion to preclude the prosecutor from arguing that Yancey was the actual shooter and that the prosecutor abided by the trial court's ruling and did not argue that theory to the jury.

At the penalty phase retrial, Clark made a motion in limine to preclude the prosecution from arguing that Antoinette Yancey shot Ardell Williams under the doctrine of collateral estoppel. (12 CT 4392-4402.) He based this contention on the fact that the jury in Yancey's separate murder trial found her guilty of Williams's murder, but found a special allegation that she personally used a firearm in the commission of the murder not to be true. (11 CT 4113, 4116.)

At the hearing on the motion, the prosecutor responded that the verdict in the Yancey case should not preclude him from arguing that Yancey shot Williams because he was under no obligation to prove beyond a reasonable doubt that Yancey was the shooter at the penalty phase retrial. (73 RT 12287-12289.) The trial court ultimately granted the motion and instructed the prosecutor,

> I think a jury found that to be untrue. I think you can show that [Yancey] was there and [Williams] was shot. You don't have to say that

[Yancey] did the shooting.

(73 RT 12424.)

The trial court later reiterated its ruling granting Clark's motion, stating that "I am saying [Clark] wins on that one." (73 RT 12426.)

The prosecutor abided by the trial court's ruling, never mentioning that Yancey was the actual shooter in either opening statement (77 RT 13088-13158) or closing argument (90 RT 16469-16536). The error Clark complained of was never permitted to occur. Clark's claim is without merit.

LXI.

THE TRIAL COURT PROPERLY REFUSED A NUMBER OF CLARK'S PROFFERED SPECIAL INSTRUCTIONS AT THE PENALTY PHASE RETRIAL AS BEING ARGUMENTATIVE AND DUPLICATIVE OF OTHER PROPERLY GIVEN INSTRUCTIONS

Clark contends the trial court improperly refused a number of special instructions proffered by the defense at the penalty phase retrial. (AOB 594-601.) However, the trial court properly rejected Clark's proffered special instructions as being argumentative and duplicative of other properly given instructions.

A. The Trial Court Properly Rejected Clark's Proposed Modifications Of CALJIC No. 8.85

At the penalty phase retrial, Clark requested that the jury be instructed according to a modified version of CALJIC No. 8.85 as follows:

> In determining which penalty is to be imposed on [Clark], you shall consider all of the evidence which has been received during any part of the trial in this case, [except as you may be hereinafter instructed.]
>
> Only those factors which are applicable on the evidence adduced at trial are to be taken into account in the penalty determination. All factors may not be relevant and a factor which is not relevant to the

evidence in a particular case should be disregarded. The absence of a statutory mitigating factor does not constitute an aggravating factor. You shall consider, take into account and be guided by the following factors, if applicable:

(a) The circumstances of the crimes of which [Clark] was convicted in the present proceeding and the existence of any special circumstances found to be true.

However, you may not double count any "circumstances of the offense" which are also "special circumstances." That is, you may not weigh the special circumstances more than once in your sentencing determination.

(b) The presence or absence of criminal activity by [Clark], other than the crimes for which [Clark] has been tried in the present proceedings, which involved the use or attempted use of force or violence.

A juror may still have a lingering or residual doubt as to whether [Clark] was the [sic] legally responsible for the murders of Ms. Lee, and Ms. Williams. Such a lingering or residual doubt, although not sufficient to raise a reasonable doubt at the guilt phase, may still be considered as a mitigating factor at the penalty phase. Each individual juror may determine whether any lingering or residual doubt is a mitigating factor and may assign it whatever weight the juror feels is appropriate.

The absence of any violent criminal activity by [Clark] other than the crimes for which he has been tried in the present proceedings is a mitigating factor.

(c) The presence or absence of any prior felony conviction, other than the crimes for which [Clark] has been tried in the present proceedings.

(i) The age of [Clark] at the time of the crime.

(j) Whether or not [Clark] was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime and any sympathetic or

other aspect of [Clark's] character or record as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.

The mitigating circumstances that I have read for your consideration are given merely as examples of some of the factors that a juror may take into account as reasons for deciding not to impose a death sentence in this case. A juror should pay careful attention to each of those factors. Any one of them may be sufficient, standing alone, to support a decision that death is not the appropriate punishment in this case. But a juror should not limit his or her consideration of mitigating circumstances to these specific factors.

A juror may also consider any other circumstances relating to the case or to the defendant as shown by the evidence as reasons for not imposing the death penalty.

A mitigating circumstance does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exists if there is any evidence to support it no matter how weak the evidence is.

Any mitigating circumstance may outweigh all the aggravating facts.

A juror is permitted to use mercy, sympathy and/or sentiment in deciding what weight to give each mitigating factor.

The factors in the above list which you determine to be aggravating circumstances are the only ones which the law permits you to consider. You are not allowed to consider any other facts or circumstances as the basis for deciding that the death penalty would be an appropriate punishment in this case.

(13 CT 4757-4760.)

The trial court, with the exception of adding the phrase, "The absence of a statutory mitigating factor does not constitute an aggravating factor," rejected Clark's proposed additions to CALJIC No. 8.85. (89 RT 16433-16439.) Clark's counsel stated that, "I just modified my request on this instruction to only include line 14 and 15 of page 4 [the above-quoted sentence regarding the absence of a mitigating factor], and I withdraw the remainder of

the instruction." (89 RT 16439.) The trial court then instructed the jury according to CALJIC No. 8.85 as follows:

> In determining which penalty is to be imposed on [Clark], you shall consider all of the evidence which has been received during any part of the trial of this case. You shall consider, take into account and be guided by the following factors, if applicable:
>
> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstance[s] found to be true.
>
> (b) The presence or absence of criminal activity by the defendant, other than the crime[s] for which the defendant has been tried in the present proceedings, which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> (c) The presence or absence of any prior felony conviction, other than the crimes for which the defendant has been tried in the present proceedings.
>
> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (e) Whether or not the victim was a participant in the defendant's homicidal conduct or consented to the homicidal act.
>
> (f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.
>
> (g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.
>
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or the effects of intoxication.
>
> (i) The age of the defendant at the time of the crime.

(j) Whether or not the defendant was an accomplice to the offense and his participation in the commission of the offense was relatively minor.

(k) Any other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offense for which he is on trial.] The absence of a statutory mitigating factor does not constitute an aggravating factor.

(13 CT 4855-4856.)

Clark contends that this Court approved a substantially similar instruction given at the defendant's request in *People v. Wharton* (1991) 53 Cal.3d 522, 600, fn. 23. However, this Court in *Wharton* did not hold that a trial court is under a sua sponte obligation to give such an instruction. (*Ibid.*) Again, with the exception of the phrase, "The absence of a statutory mitigating factor does not constitute an aggravating factor," which was given by the court, Clark expressly abandoned his request that additional language be added to CALJIC No. 8.85. (89 RT 16439.) A criminal defendant cannot " 'complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete' " where the defendant did not request clarifying language in the trial court. (*People v. Valdez*, *supra*, 32 Cal.4th at p. 113.) Clark's express abandonment of the proposed clarifying language in the trial court forfeits the issue on appeal. (See *Ibid.*)

Nonetheless, the jury was properly instructed according to CALJIC No. 8.85. As this Court has repeatedly concluded, CALJIC No. 8.85 is a legally correct instruction. (See e.g. *People v. Moon*, *supra*, 37 Cal.4th at pp. 41-42; *People v. Young* (2005) 34 Cal.4th 1149, 1225-1226.)

Nonetheless, Clark contends that CALJIC No. 8.85, as given, improperly imposed a requirement that the jury find substantial evidence to support a mitigating factor. (AOB 594.) In the first instance, Clark does not

cite any language in the instruction given to the jury that imposed a standard of substantial evidence on mitigating factors. The instruction is silent as to any burden of proof for mitigating factors, and thus the jury is free to consider mitigating factors based on any quantum of evidence presented. (See e.g. *People v. Welch* (1999) 20 Cal.4th 701, 767.)

Moreover, Clark's reliance on *People v. Wharton* is misplaced. In *Wharton*, this Court found a defense special instruction given by the trial court that included the phrase "[y]ou must find a mitigating circumstance exists if there is any substantial evidence to support it" did not improperly place the burden of proving mitigating factors on the defendant by substantial evidence. (*People v. Wharton*, *supra*, 53 Cal.3d at p. 600.) CALJIC No. 8.85, as given to the jury in this case, did not contain any comparable language and, regardless, this Court found such language in *Wharton* to be proper.

Clark's other claims with respect to his proposed modified version of CALJIC No. 8.85 are similarly without merit. Clark's proposed language that mitigating factors were not limited to those enumerated in the instruction (AOB 594) was duplicative of the language of factor (k) in CALJIC No. 8.85 as provided to the jury. This court has previously interpreted factor (k) "as '"allow[ing] the jury to consider a virtually unlimited range of mitigating circumstances." ' [Citation.]" (*People v. San Nicolas*, *supra*, 34 Cal.4th at pp. 673-674.) The trial court's rejection of the proposed language as duplicative was therefore proper. (See *Ibid.*)

Contrary to Clark's assertion (AOB 595), factor (k) also adequately communicated that mercy, sympathy and sentiment were relevant in weighing the mitigating factors. This Court has previously rejected a proposed instruction similar to the one initially requested by Clark as both improper and cumulative of CALJIC No. 8.85(k). (See *People v. Lewis*, *supra*, 26 Cal.4th at p. 393 [finding trial court's rejection of proposed instruction that "[i]n determining whether to sentence the defendant to life imprisonment without

possibility of parole, or to death, you may decide to exercise mercy on behalf of the defendant" proper].)

B. The Trial Court Properly Rejected Clark's Proposed Modifications Of CALJIC No. 8.87

At the penalty phase retrial, Clark requested that the jury be instructed according to a modified version of CALJIC No. 8.87 as follows:

> Evidence has been introduced for the purpose of showing that [Clark] had committed the criminal acts read to you elsewhere in these instructions.
>
> Before a juror may consider any of such criminal acts as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that [Clark] did in fact commit such criminal acts. A juror may not consider any evidence of any other criminal acts as an aggravating circumstance.
>
> You may not consider as aggravation any evidence of unadjudicated acts allegedly committed by [Clark] unless you first determine beyond a reasonable doubt that (1) [Clark] committed the acts; (2) the acts involved the use or attempted use of force or violence or the expressed [sic] or implied threat to use force or violence; [and] (3) the acts were criminal.

(13 CT 4762.)

The trial court rejected Clark's proffered modification of the instruction (89 RT 16440) and ultimately instructed the jury according to CALJIC No. 8.87 as follows:

> Evidence has been introduced for the purpose of showing that [Clark] has committed the following criminal activity: An attempt to prevent or dissuade a witness, Alonzo Garrett, from attending or giving testimony, which involved the threat of force or violence. Before a juror may consider any criminal activity as an aggravating circumstance in this case, a juror must first be satisfied beyond a reasonable doubt that [Clark] did in fact commit the criminal activity. A juror may not consider any evidence of any other criminal activity as an aggravating circumstance.

> It is not necessary for all jurors to agree. If any juror is convinced beyond a reasonable doubt that the criminal activity occurred, that juror may consider that activity as a fact in aggravation. If a juror is not so convinced, that juror must not consider that evidence for any purpose.

(13 CT 4861.)

Clark contends that the last paragraph of the version of CALJIC No. 8.87 given by the trial court improperly included an admonition that the jurors did not have to unanimously agree on criminal activity in order to utilize it as a factor in aggravation, language that was omitted from the proffered modified instruction rejected by the trial court. Clark contends that, because he was not permitted to seek an instruction that the jurors did not have to be unanimous as to mitigating factors, it was unfair to permit such an instruction with respect to aggravating factors. (AOB 596.)

This same argument was rejected by this Court in *People v. Holt* (1997) 15 Cal.4th 619, 685-686. Here, as in *Holt*, the jury was instructed according to CALJIC No. 17.40 that the parties were "entitled to the individual opinion of each juror" and that "[e]ach of you must decide the case for yourself." (13 CT 4863.) "Those instructions adequately informed the jury that resolution of penalty phase factual questions as well as deciding the appropriate penalty was an individual responsibility." (*People v. Holt*, *supra*, 15 Cal.4th at p. 686.) The jury was correctly instructed according to CALJIC No. 8.87. (See *Ibid.*)

C. The Trial Court Properly Rejected Clark's Proposed Special "Aggravating And Mitigating Factors" Instruction

At the penalty phase retrial, Clark requested that the jury be instructed according to a special "Aggravating and Mitigating Factors" instruction as follows:

> The determination of punishment turns on the personal moral culpability of [Clark].

Such culpability is assessed in accordance with the specified factors of aggravation and mitigation upon which I have already instructed you.

For purposes here, "aggravating" means that which increases [Clark's] personal moral culpability above the level of blameworthiness that inheres in the capital offense. By contrast, "mitigation" means that which reduces his culpability below that level.

Thus, the circumstances of the crimes itself can be either aggravating or mitigating. Their character depends on the greater or lesser blameworthiness they reveal - ranging, for example, from the most intentional of willful, deliberate, and premeditated murders to the most accidental of felony murders.

Other violent criminal activity is similar. Its presents [sic] is aggravating, suggesting as it does that the capital offense is the product more of [Clark's] basic character than of the accidents of his situation. Its absence is obviously mitigating, carrying the opposite suggestion.

This is also the case with prior felony convictions. Their existence is aggravating. They reflect on the relatively greater contribution of character than situation. Moreover, they reveal that [Clark] had been taught, through the application of formal sanction, that criminal conduct was unacceptable - but had failed or refused to learn this lesson. By contrast, the nonexistence of such convictions plainly is mitigating.

The age of [Clark] can also be either aggravating or mitigating.

The existence of any of the following circumstances, however, is mitigating and mitigating only: extreme mental or emotional disturbance; victim participation or consent; reasonable belief in moral justification or extenuation; extreme duress or substantial domination; impairment through mental disease or defect or through intoxication; status as an accomplice and minor participant; and any other extenuating fact. By contrast, the nonexistence of any of these circumstances is not and cannot be aggravating. The absence of mitigation does not amount to the presence of aggravation.

(13 CT 4769-4770.)

The trial court denied Clark's request to give the proffered instruction, finding it "argumentative, somewhat vague, and covered by [CALJIC No.]

8.88." (89 RT 16441-16442.) The trial court instead instructed the jury according to CAJLIC No. 8.88 as follows:

> It is now your duty to determine which of the two penalties, death or imprisonment in the state prison for life without possibility of parole, shall be imposed on [the] defendant.
>
> After having heard all of the evidence, and after having heard and considered the arguments of counsel, you shall consider, take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed.
>
> An aggravating factor is any fact, condition or event attending the commission of a crime which increases its severity or enormity, or adds to its injurious consequences which is above and beyond the elements of the crime itself. A mitigating circumstance is any fact, condition or event which does not constitute a justification or excuse for the crime in question, but may be considered as an extenuating circumstance in determining the appropriateness of the death penalty.
>
> The weighing of aggravating and mitigating circumstances does not mean a mere mechanical counting of factors on each side of an imaginary scale, or the arbitrary assignment of weights to any of them. You are free to assign whatever moral or sympathetic value you deem appropriate to each and all of the various factors you are permitted to consider. In weighing the various circumstances you determine under the relevant evidence which penalty is justified and appropriate by considering the totality of the aggravating circumstances with the totality of the mitigating circumstances. To return a judgment of death, each of you must be persuaded that the aggravating circumstances are so substantial in comparison with the mitigating circumstances that it warrants death instead of life without parole.
>
> You shall now retire to deliberate on the penalty. In order to make a determination as to the penalty, all twelve jurors must agree.
>
> Any verdict that you reach must be dated and signed by your foreperson on a form that will be provided and then you shall return with it to this courtroom.

(13 CT 4867.)

Clark contends that the trial court's rejection of his proposed instruction improperly deprived the jury of guidance as to which of the enumerated factors could be considered aggravating and which factors could be considered mitigating. (AOB 597.) However, there is no requirement that a court instruct a jury as to which of the factors enumerated in Penal Code section 190.3 are aggravating and which are mitigating. (*People v. Young*, *supra*, 34 Cal.4th at p. 1226; *People v. Espinoza* (1992) 3 Cal.4th 806, 827.) As this Court observed in *People v. Vieira* (2005) 35 Cal.4th 264, 299,

> It is generally the task of defense counsel in its closing argument, rather than the trial court in its instructions, to make clear to the jury which penalty phase evidence or circumstances should be considered extenuating under factor (k).

D. The Trial Court Properly Rejected Clark's Proposed Special "Scope Of Mitigation: No Mitigation Necessary To Reject Death" Instruction

At the penalty phase retrial, Clark requested that the jury be instructed according to a special "Scope of Mitigation: No Mitigation Necessary to Reject Death" instruction as follows:

> You have the discretion to decide the appropriate penalty by weighing all the relevant evidence.
>
> You may decide, even in the absence of mitigating evidence, that the aggravating evidence is not comparatively substantial enough to warrant death.

(13 CT 4774.)

The trial court declined to give the proffered instruction, finding that it was duplicative of CALJIC No. 8.88. (89 RT 16442-16445.) The trial court's ruling was correct.

This Court has previously held that CALJIC No. 8.88 adequately informs jurors that they may reject a death sentence even in the absence of any mitigating evidence. (*People v. Ray*, *supra*, 13 Cal.4th at pp. 355-356.)

> By stating that death can be imposed in only one circumstance-where aggravation substantially outweighs mitigation-the instruction clearly implies that a sentence less than death *may* be imposed in all other circumstances. "No reasonable juror would assume he or she was required to impose death despite insubstantial aggravating circumstances, merely because no mitigating circumstances were found to exist." [Citations.]

(*Id.* at p. 356, original italics.)

E. The Trial Court Properly Rejected Clark's Proposed Special "Scope And Proof Of Mitigation: Sympathy Alone Is Sufficient To Reject Death" Instruction

At the penalty phase retrial, Clark requested that the jury be instructed according to a special "Scope and Proof of Mitigation: Sympathy Alone is Sufficient to Reject Death" instruction as follows:

> If the mitigating evidence gives rise to compassion or sympathy for [Clark], the jury may, based upon such sympathy or compassion alone, reject death as a penalty. A [m]itigating factor does not have to be proved beyond a reasonable doubt. A juror may find that a mitigating circumstance exists if there is any evidence to support it not [sic] matter how weak the evidence is.

(13 CT 4779.)

The trial court declined to give the proffered instruction, finding it to be argumentative and duplicative of CALJIC No. 8.85(k). (89 RT 16445-16446.)

This Court found the identical instruction to be duplicative of CALJIC Nos. 8.85(k) and 8.88 and properly refused. (*People v. Hinton* (2006) 37 Cal.4th 839, 911-912.) Clark provides no basis for this Court to revisit its decision in *Hinton*. This Court should similarly reject Clark's claim.

LXII.

CLARK FORFEITED HIS CLAIM THAT THE JURY AT THE PENALTY PHASE RETRIAL SHOULD HAVE BEEN INSTRUCTED THAT IT COULD CONSIDER CLARK'S BACKGROUND AS MITIGATION BY FAILING TO REQUEST SUCH AN INSTRUCTION AND, REGARDLESS, CALJIC NO. 8.85 (K) ADEQUATELY INFORMED THE JURY THAT IT COULD CONSIDER CLARK'S BACKGROUND AS MITIGATION

Clark contends that the trial court improperly refused to instruct the jury at the penalty phase retrial that it could consider his background as mitigation, in addition to his character and record. (AOB 602-613.) In the first instance, Clark forfeited the claim because he never requested that the jury be so instructed in the trial court. Further, CALJIC No. 8.85(k) adequately informed the jury that it could consider Clark's background as mitigation.

Clark has forfeited the claim on appeal.

> "A party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language."

(*People v. Hart*, *supra*, 20 Cal.4th at p. 622, quoting *People v. Lang* (1989) 49 Cal.3d 991, 1024.)

Clark contends that "[d]efense special instruction No. 1 sought to expand the scope of mitigation in order [sic] by specifically instructing the jury that mitigation encompassed evidence including Clark's background." (AOB 610.) The record does not support Clark's contention. The modified version of CALJIC No. 8.85 offered by Clark did not include the word "background" in its discussion of mitigating factors.[51/] (13 CT 4757-4760; 89 RT 16431-16448.) In fact, the language of factor (k) in Clark's proposed instruction was identical to that of factor (k) in CALJIC No. 8.85 as provided

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51. The complete text of Clark's proposed instruction is provided in Argument LVI, subdivision (A), *ante*.

to the jury, except that the trial court, at Clark's request, added the phrase, "The absence of a statutory mitigating factor does not constitute an aggravating factor." (13 CT 4758-4759, 4856; 89 RT 16439.) Clark's failure to request that the jury be specifically instructed that it could consider Clark's background as a mitigating factor forfeited the claim on appeal. (See *People v. Hart*, *supra*, 20 Cal.4th at p. 622.)

Moreover, the instructions given adequately conveyed to the jury that it could consider Clark's background as mitigation. This Court has previously rejected a similar claim that a jury in the penalty phase of a capital trial must be instructed that it may consider the defendant's background as mitigation, in addition to the defendant's character and record. (*People v. Memro* (1995) 11 Cal.4th 786, 881.) As in *Memro*, the jury here was instructed according to CALJIC No. 8.85(k) that it could consider,

> [a]ny other circumstance which extenuates the gravity of the crime even though it is not a legal excuse for the crime [and any sympathetic or other aspect of the defendant's character or record [that the defendant offers] as a basis for a sentence less than death[.]

(13 CT 4856.)

As in *Memro*, the instruction given "left 'no possibility the jury misunderstood its obligation to consider defendant's character and background evidence. . . .' " (See *People v. Memro*, *supra*, 11 Cal.4th at p. 881.) There was no error.

LXIII.

CLARK HAS FORFEITED HIS CLAIM THE JURY AT THE PENALTY PHASE RETRIAL SHOULD HAVE BEEN INSTRUCTED ACCORDING TO CALJIC NO. 2.11.5 AND, REGARDLESS, NO ADDITIONAL INSTRUCTION ON UNJOINED PERPETRATORS WAS REQUIRED

Clark contends that the trial court improperly refused to instruct the jury at the penalty phase retrial according to CALJIC No. 2.11.5,[52/] Unjoined Perpetrators of Same Crime, and that the court's refusal resulted in the jury giving improper consideration to the fate of Yancey, Ervin, Wilson, and Eric Clark when sentencing Clark to death. (AOB 614-620.) However, Clark has forfeited the claim by failing to request the instruction in the trial court. Furthermore, the trial court was under no obligation to give the instruction because it was duplicative and added nothing to the other properly given instructions in the case and any claim of prejudice based upon the absence of the instruction is entirely speculative.

A trial court is obligated, even absent a request, to instruct on the general principles of law in a case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) General principles of law are defined as " 'those principles closely and openly

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52. CALJIC No. 2.11.5 provides:

> There has been evidence in this case indicating that a person other than a defendant was or may have been involved in the crime for which that defendant is on trial.
>
> There may be many reasons why that person is not here on trial. Therefore, do not speculate or guess as to why the other person is not being prosecuted in this trial or whether [he] [she] has been or will be prosecuted. Your [sole] duty is to decide whether the People have proved the guilt of [each] [the] defendant on trial.

connected with the facts before the court, and which are necessary for the jury's understanding of the case.' " (*Ibid.*)

Although this Court has never decided whether an unjoined perpetrator instruction such as CALJIC No. 2.11.5 is a general principle of law implicating a trial court's sua sponte instructional obligations, this Court's reasoning in *Breverman* counsels against such a finding. First, the instruction is not "necessary for the jury's understanding of the case," as *Breverman's* definition of a general principle of law requires. The purpose of an unjoined perpetrator instruction is to

> "discourage the jury from irrelevant speculation about the prosecution's reasons for not jointly prosecuting all those shown by the evidence to have participated in the perpetration of the charged offenses, and also to discourage speculation about the eventual fates of unjoined perpetrators. [Citation.]"

(*People v. Cain* (1995) 10 Cal.4th 1, 35.)

As the above demonstrates, the instruction is more appropriately viewed as a limiting instruction, in that it limits the purpose for which the jury may consider otherwise properly admitted evidence of third party involvement in the crimes. Limiting instructions, by statute, must only be given upon request. (Evid. Code, § 355; see also *People v. Dennis*, *supra*, 17 Cal.4th at p. 533.) Here, Clark did not request that CALJIC No. 2.11.5 be given.

At the penalty phase retrial, the trial court initiated a discussion of the propriety of giving CALJIC No. 2.11.5. (89 RT 16291.) When asked about the instruction, Clark's counsel opined that it was a correct statement of the law. (89 RT 16292.) The trial court disagreed, indicating that the instruction was incorrect because it discussed the prosecution's burden of proving Clark guilty, which was inapplicable at the penalty phase of the trial. (89 RT 16292.) The trial court also noted that it was improper to give the instruction where two of the other uncharged perpetrators were witnesses. (89 RT 16293.)

Although Clark's counsel vaguely suggested that the instruction could be modified to omit the final sentence about the prosecution's burden of proving guilt, Clark offered no other appropriate modifying language or, indeed, any language at all. (89 RT 16292.) Instead, Clark's counsel ultimately sought to withdraw the instruction, stating, "I was going to say withdrawn, but it [CALJIC No. 2.11.5] is not on our list. It is the Court's instruction." (89 RT 16293; 13 CT 4748-4753.) The trial court declined to give the instruction. (89 RT 16293.) Clark's express disavowal of any request that the trial court instruct according to CALJIC No. 2.11.5 forfeits the claim on appeal. (See e.g., Evid. Code, § 355; *People v. Dennis*, *supra*, 17 Cal.4th at p. 533.)

However, even assuming the issue were preserved on appeal, the trial court properly declined to give the instruction. In the first instance, it is improper for a trial court at the penalty phase of a capital trial to instruct the jury according to CALJIC No. 2.11.5 regarding uncharged perpetrators where those individuals have testified as witnesses in the case, as this would interfere with the ability to challenge accomplice testimony. (*People v. Hernandez* (2003) 30 Cal.4th 835, 875.) In the instant case, both Matt Weaver and Jeanette Moore testified at the penalty phase and the trial court gave the panoply of instructions relating to accomplice testimony. (13 CT 4838-4839.) Accordingly, it would have been improper to give the instruction in its unmodified form. (See *Ibid.*)

Clark contends that the instruction should have been modified to exclude Weaver and Moore, instead focusing on Eric Clark, Nokkuwa Ervin, Damian Wilson, and Antoinette Yancey, who did not testify in the case. (AOB 616.) However, a trial court may properly refuse to give an instruction that is duplicative of other instructions, as well as those that are incorrect or confusing. (*People v. Moon*, *supra*, 37 Cal.4th at p. 30.) The trial court instructed the jury according to CALJIC No. 8.85(j) that, in determining the penalty, it could consider "[w]hether or not the defendant was an accomplice to the offense and

his participation in the commission of the offense was relatively minor." (13 CT 4856; Pen. Code, § 190.3, subd. (j).) This instruction informed the jury of the limited purpose for which it could consider the participation of third parties in the offenses and therefore CALJIC No. 2.11.5 was unnecessary and duplicative.

Nonetheless, even assuming that the trial court should have instructed the jury according to CALJIC No. 2.11.5, any error was harmless. A penalty phase determination will not be reversed based on instructional error unless it is reasonably probable that a more favorable penalty determination would have been made absent the error. (*People v. Slaughter* (2002) 27 Cal.4th 1187, 1201.)

First, as discussed above, since Moore and Weaver testified, they were not properly the subject of CALJIC No. 2.11.5, but rather consideration of their testimony was more properly the subject of the accomplice instructions given by the trial court. Accordingly, the only possible error with respect to not giving CALJIC No. 2.11.5 would relate to Yancey, Ervin, Wilson, and Eric Clark.

Clark argues that the absence of the instruction was prejudicial because it allowed the jury to believe that "four others may have gotten away with serious crimes, or received light sentences, and used the case against Clark to 'send a message.' " (AOB 619.) However, Clark's argument "piles speculation upon speculation" to arrive at the untenable conclusion that the jury's penalty determination reflects improper consideration of the fates of these four unjoined perpetrators. (See *People v. Carrera* (1989) 49 Cal.3d 291, 343.)

No mention was made during the penalty phase retrial as to the fates of any unjoined perpetrators in the case. The prosecutor never suggested to the jury that Clark was anything but the pivotal participant in the crimes or that he

deserved death based on anything other than his own personal culpability. As the prosecutor explained in argument,

> [T]he only conclusion that you can draw is that [Clark] is responsible for these two crimes. That is the only conclusion.
>
> There is no lingering doubt. The person who masterminded that robbery is now before you for you to pass judgment for punishment.
>
> The person who orchestrated while he is in jail the murder of Ardell Williams is now before you for you to determine the punishment.
>
> You have the right person. You have the person, who . . . deserves and richly so the death penalty.

(90 RT 16522.)

It is not reasonably probable that the jury at the penalty phase retrial improperly considered the fate of unjoined perpetrators in determining Clark's sentence and any error in not instructing the jury according to CALJIC No. 2.11.5 was harmless.

LXIV.

THE TRIAL COURT PROPERLY REFUSED TO INSTRUCT THE JURY ACCORDING TO CALJIC NO. 2.40 BECAUSE THE INSTRUCTION IS, BY ITS TERMS, A GUILT PHASE INSTRUCTION AND, IN ANY EVENT, THE CONSIDERATION OF CLARK'S CHARACTER WAS ADEQUATELY COVERED BY CALJIC NO. 8.85 (k)

Clark contends that the trial court improperly refused to instruct the jury at the penalty phase retrial according to CALJIC No. 2.40,[53] Traits of Character

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53. Clark offered an edited version of CALJIC No. 2.40, which read:

> Evidence has been received for the purpose of showing the good character of the defendant for those traits ordinarily involved in the commission of a crime, such as that charged in this case.

of Defendant. To the contrary, the trial court properly refused to instruct the jury according to CALJIC No. 2.40 because the instruction is, by its terms, a guilt phase instruction and, regardless, the consideration of Clark's character was adequately covered by CALJIC No. 8.85(k).

At the penalty phase retrial, Clark requested that the jury be instructed according to CALJIC No. 2.40 regarding evidence of Clark's good character. (13 CT 4807; 89 RT 16296.) The prosecutor objected, noting that the instruction referred to reasonable doubt at the guilt phase and argued that factor (k) adequately covered the consideration of mitigating evidence regarding Clark's character. (89 RT 16296.)

Clark's counsel indicated that the instruction could be modified to allay the concerns of the court and the prosecutor and requested an opportunity to do so. The trial court refused to give the instruction in its present form, noting that the substance of the instruction was covered by factor (k), but indicated that "we'll look at it after [Clark's counsel] modify it." (89 RT 16296.)

At a later hearing on jury instructions, the trial court revisited CALJIC No. 2.40. Without offering any modification to the portion of the instruction relating to reasonable doubt as to guilt, Clark simply submitted on the issue.

> Good character for the traits involved in the commission of the crime[s] charged may be sufficient by itself to raise a reasonable doubt as to the guilt of a defendant. It may be reasoned that a person of good character as to these traits would not be likely to commit the crime[s] of which the defendant is charged.
>
> If the defendant's character as to certain traits has not been discussed among those who know [him], you may infer from the absence of this discussion that [his] character in those respects is good.

(13 CT 4807.)

(89 RT 16431.) The prosecutor again objected to the instruction and the trial court refused to give the instruction, explaining,

> I don't know how it helps. You can argue character all you like, but I think this reads too much into this concept of lingering doubt. And I am reluctant to give it. It is argumentative in any event. So it is refused.

(89 RT 16431.)

The trial court properly refused to instruct the jury according to CALJIC No. 2.40 at the penalty phase retrial. As this Court has noted, "By its very language-referring to reasonable doubt as to guilt-this instruction [CALJIC No. 2.40] applies only to the guilt phase of trial. [Citation.]." (*People v. Benavides* (2005) 35 Cal.4th 69, 112.) Accordingly, the trial court was correct in finding the instruction to be improper and refusing to give it. (See *Ibid.*)

Moreover, the jury at the penalty phase retrial, as in *Benavides*, "was not without guidance as to the use of the character evidence presented at the penalty phase." (See *Ibid.*) The jury was instructed according to CALJIC No. 8.85(k) that it could consider "any sympathetic or other aspect of defendant's character or record [that the defendant offers] as a basis for a sentence less than death, whether or not related to the offenses for which he has been on trial." (13 CT 4856.) The jury was adequately instructed. (See *Ibid.*)

LXV.

CALIFORNIA'S DEATH PENALTY STATUTE DOES NOT VIOLATE THE UNITED STATES CONSTITUTION

Clark presents numerous challenges to the constitutionality of California's death penalty statute. (AOB 629-704.) This Court has consistently and repeatedly rejected these identical claims and should do so here.

A. California's Death Penalty Law Does Not Violate The United States Constitution Because It Meaningfully Narrows The Class Of Persons Eligible For The Death Penalty

Clark contends California's death penalty statute violates the United States Constitution because it is impermissibly broad and fails to meaningfully narrow the class of persons eligible for the death penalty. (AOB 631-636.) However, this Court has consistently rejected the identical claim and should do so here.

In order for a state death penalty statute to survive constitutional scrutiny, the special circumstances that render a defendant eligible for the death penalty,

> must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder.

(*Zant v. Stephens* (1983) 462 U.S. 862, 877 [103 S.Ct. 2733, 77 L.Ed.2d 235].)

This Court, in its prior decisions, has consistently found that "[t]he special circumstances listed in section 190.2 adequately narrow the class of murders for which the death penalty may be imposed." (*People v. Snow*, *supra*, 30 Cal.4th at pp.125-126; accord *People v. Anderson* (2001) 25 Cal.4th 543, 601; *People v. Sakarias*, *supra*, 22 Cal.4th at p. 632; *People v. Frye*, *supra*, 18 Cal.4th at pp. 1028-1029.)

Clark nonetheless conclusorily alleges that California's 1978 death penalty law was intended not to narrow the class of murderers eligible for the death penalty, but "to make all murderers eligible." (AOB 632.) Clark focuses on the felony-murder and lying-in-wait special circumstances as evidencing this alleged expansion of death-penalty eligibility. (AOB 633-634.)

This Court has previously rejected the identical argument with respect to the felony-murder special circumstance, holding that,

> it appears to be generally accepted that by making the felony murderer but not the simple murderer death-eligible, a death penalty law furnishes

> the "meaningful basis [required by the Eighth Amendment] for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not." [Citations.]

(*People v. Anderson* (1987) 43 Cal.3d 1104, 1147, quoting *Furman v. Georgia* (1972) 408 U.S. 238, 313 [92 S.Ct. 2726, 33 L.Ed.2d 346,] (conc. opn. of White, J.); accord *People v. Musselwhite*, *supra*, 17 Cal.4th at pp. 1265-1266; *People v. Marshall*, *supra*, 50 Cal.3d at p. 946.) Similarly, this Court has found the lying-in-wait special circumstance adequately narrows the class of murderers eligible for the death penalty. (*People v. Hillhouse*, *supra*, 27 Cal.4th at p. 510; *People v. Carpenter* (1997) 15 Cal.4th 312, 419; accord *Morales v. Woodford* (2004) 388 F.3d 1159, 1175-1178.) Clark utterly fails to address the many prior decisions of this Court rejecting his contention.

In short, California's death penalty law does not violate the United States Constitution because the special circumstances under section 190.2 adequately narrow the class of murderers eligible for the death penalty. Accordingly, Clark's claim should fail.

B. California's Death Penalty Law Does Not Violate The United States Constitution Because Penal Code Section 190.3, Subdivision (a) Does Not Allow Arbitrary And Capricious Imposition Of The Death Penalty

Clark contends that Penal Code section 190.3, subdivision (a), which calls for consideration of "[t]he circumstances of the crime" in capital case penalty determination has been applied in ways "so arbitrary and contradictory" as to violate the United States Constitution. (AOB 637-645.) However, this Court has consistently rejected the identical claim and should do so here.

As the United States Supreme Court explained in rejecting a challenge to Penal Code section 190.3, subdivision (a) on constitutional vagueness grounds,

> our capital jurisprudence has established that the sentencer should consider the circumstances of the crime in deciding whether to impose the death penalty. [Citation.] We would be hard pressed to invalidate a jury instruction that implements what we have said the law requires. In any event, this California factor instructs the jury to consider a relevant subject matter and does so in understandable terms. The circumstances of the crime are a traditional subject for consideration by the sentencer, and an instruction to consider the circumstances is neither vague nor otherwise improper under our Eighth Amendment jurisprudence.

(*Tuilaepa v. California* (1994) 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750].)

This Court has consistently rejected the identical claim in its prior decisions. (*People v. Ramos* (2004) 34 Cal.4th 494, 533; *People v. Maury*, *supra*, 30 Cal.4th at p. 439; *People v. Jenkins*, *supra*, 22 Cal.4th at pp. 1050-1053.) Clark utterly fails to address the prior decisions of this Court rejecting his claim.

As this Court has previously held, Penal Code section 190.3, subdivision (a) is neither arbitrarily nor inconsistently applied and does not violate the United States Constitution. His claim should be rejected.

C. The United States Constitution Does Not Require That Additional Procedural Safeguards Be Imposed At The Penalty Phase Of Capital Trials

Clark attacks a number of prior decisions of this Court rejecting arguments that the United States Constitution requires additional procedural safeguards be imposed at the penalty phase of capital trials. (AOB 645-687.) This Court has consistently rejected these arguments and should do so here. (*People v. Prieto* (2003) 30 Cal.4th 226, 262-263 [no requirement jury find

aggravating factors true beyond a reasonable doubt]; *People v. Snow*, *supra*, 30 Cal.4th at p. 126 [same]; *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590 [same]; *People v. Brown* (2004) 33 Cal.4th 382, 402 [no requirement of juror unanimity as to aggravating factors]; *People v. Prieto*, *supra*, 30 Cal.4th at p. 263 [same]; *People v. Brown*, *supra*, 33 Cal.4th at pp. 401-402 [lack of burden of proof in penalty determination proper, no requirement that jury make written findings]; *People v. Jenkins*, *supra*, 22 Cal.4th at pp. 1053-1054 [same]; *People v. Brown*, *supra*, 33 Cal.4th at p. 402 [no requirement of intercase proportionality review]; *People v. Prieto*, *supra*, 30 Cal.4th at p. 276 [same]; *People v. Brown*, *supra*, 33 Cal.4th at p. 402 [jury may properly consider unadjudicated criminal activity in penalty determination]; *People v. Anderson*, *supra*, 25 Cal.4th at p. 584 [same]; *People v. Brown*, *supra*, 33 Cal.4th at p. 402 [use of such adjectives as "extreme" and "substantial" in the list of mitigating factors proper]; *People v. Prieto*, *supra*, 30 Cal.4th at p. 276 [same]; *People v. Brown*, *supra*, 33 Cal.4th at p. 402 [no requirement that court identify which factors are aggravating/mitigating or instruct that certain factors can only be considered in mitigation].)

D. California's Death Penalty Law Does Not Violate The Equal Protection Guarantee Of The United States Constitution By Denying Procedural Safeguards To Capital Defendants That Are Afforded To Non-Capital Defendants Because Capital Sentencing Considerations Are Wholly Different Than Those In Non-Capital Cases

Clark contends that California's death penalty law violates the equal protection guarantee of the United States Constitution because it denies procedural safeguards to capital defendants that is afforded to non-capital defendants. (AOB 688-689.) This Court has consistently rejected the identical claim and should do so here.

As this Court explained in *People v. Blair*, *supra*, 36 Cal.4th at p. 754,

> we have rejected the notion that in view of the availability of certain procedural safeguards such as intercase proportionality review in noncapital cases, the denial of those same protections in capital cases violates equal protection principles under the Fourteenth Amendment. [Citations.] As we have observed, capital case sentencing involves considerations wholly different from those involved in ordinary criminal sentencing. [Citation.] By parity of reasoning, the availability of procedural protections such as jury unanimity or written factual findings in noncapital cases does not signify that California's death penalty statute violates equal protection principles.

Clark fails to address *Blair* or any of the other decisions of this Court cited therein rejecting his claim. (See *People v. Ramos* (1997) 15 Cal.4th 1133, 1182; *People v. Cox* (1991) 53 Cal.3d 618, 691; *People v. Allen* (1986) 42 Cal.3d 1222, 1287-1288.)

As this Court has previously held, California's death penalty law does not violate equal protection. His claim should be rejected.

E. California's Death Penalty Law Does Not Violate The United States Constitution Because The Use Of The Death Penalty Does Not Fall Short Of International Norms Of Human Decency

Clark contends California's death penalty statute violates the United States Constitution because the use of the death penalty as a regular form of punishment falls short of international norms of human decency. (AOB 698-704.) This Court has consistently rejected the identical claim and should do so here.

Initially, Clark lacks standing to challenge California's death penalty statute as violating international law. It is the general rule that international law does not confer standing on individuals to raise claims of international law violations in domestic courts. (See *Committee of U.S. Citizens Living in Nicaragua v. Reagan* (D.C. Cir. 1988) 859 F.2d 929, 937; see also *People v. Brown*, *supra*, 33 Cal.4th at p. 403, citing *Hanoch Tel-Oren v. Libyan Arab*

Republic (D.D.C. 1981) 517 F.Supp. 542, 545-547.) Accordingly, this Court should reject Clark's contention as he lacks standing to challenge California law on international law grounds.

Nonetheless, Clark's argument that California's death penalty statute violates the Eighth and Fourteenth Amendments based on customary international law is unpersuasive. Clark concedes that "this country is not bound by the laws of any other sovereignty in its administration of our criminal justice." (AOB 699.) The United States Supreme Court recently reaffirmed this principle in *Roper v. Simmons* (2005) 543 U.S. 551, ___ [125 S.Ct. 1183, 1198, 161 L.Ed.2d 1], noting that, while the United States Supreme Court "has referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment's prohibition of 'cruel and unusual punishments,'" it remains the task of the High Court ultimately to interpret the Eighth Amendment. Although the United States Supreme Court has never directly addressed the issue of whether the death penalty violates international law, the lower courts that have considered the question have uniformly concluded that it does not. (See *Buell v. Mitchell* (6th Cir. 2001) 274 F.3d 337, 376.)

The prohibition of the death penalty is not so extensive and virtually uniform among the nations of the world that it is a customary international norm. According to Amnesty International, as of November 28, 2005, 110 countries in the world still have some sort of death penalty law in place, while 86 countries have abolished the death penalty for all crimes.[54/] (Facts and Figures on the Death Penalty:

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54. Of the 110 countries which retain the death penalty, 11 reserve the death penalty only for so-called "exceptional crimes," and 25 have not carried out an execution for at least the past 10 years. (Facts and Figures on the Death Penalty, <http://web.amnesty.org/pages/deathpenalty-facts-eng> [as of Nov. 28, 2005].)

<http://web.amnesty.org/pages/deathpenalty-facts-eng> [as of Nov. 28, 2005].)

As the Sixth Circuit Court of Appeal explained in *Buell*,

> There is no indication that the countries that have abolished the death penalty have done so out of a sense of legal obligation, rather than for moral, political, or other reasons. Moreover, since the abolition of the death penalty is not a customary norm of international law, it cannot have risen to the level that the international community as a whole recognizes it as jus cogens, or a norm from which no derogation is permitted.

(*Buell v. Mitchell*, *supra*, 274 F.3d at p. 373.) Therefore, there is no basis for this Court to conclude that the abolition of the death penalty is a customary norm of international law or that it has risen to the higher status of jus cogens.

Finally, Clark's claim lacks merit because it has repeatedly been specifically rejected by this Court. (*People v. Harris*, *supra*, 37 Cal.4th at p. 366; *People v. Wilson*, *supra*, 36 Cal.4th at p. 362; *People v. Ward* (2005) 36 Cal.4th 186, 222; *People v. Brown*, *supra*, 33 Cal.4th at p. 403; *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511; *People v. Ghent*, *supra*, 43 Cal.3d at pp. 778-779.) Clark utterly fails to address the many prior decisions of this Court rejecting his contention.

In short, Clark has no standing to invoke international law as a basis for challenging his judgment of death and, regardless, California's death penalty law does not violate the United States Constitution because the use of the death penalty does not fall short of international norms of human decency. Accordingly, Clark's claim should fail.

LXVI.

THE AGGRAVATING FACTORS SET FORTH IN PENAL CODE SECTION 190.3 AND CALJIC NO. 8.85 DID NOT VIOLATE THE UNITED STATES CONSTITUTION

Clark makes a number of constitutional challenges to the aggravating factors set forth in Penal Code section 190.3 and CALJIC No. 8.85. (AOB

705-742.) As will be discussed below, this Court has uniformly rejected these challenges and should do so here.

A. Penal Code Section 190.3 Factors (a) And (b) Are Not Unconstitutionally Vague

Clark challenges two of the aggravating factors set forth in Penal Code section 190.3 and CALJIC No. 8.85, factors (a) and (b),[55] as being unconstitutionally vague in violation of the Eighth and Fourteenth Amendments. (AOB 709-714.) This Court has previously recognized the United States Supreme Court's rejection of these identical arguments and should do so here. (*People v. Williams*, *supra*, 16 Cal.4th at pp. 267-268, citing *Tuilaepa v. California*, *supra*, 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750] [factors (a) and (b) not unconstitutionally vague because they possess " ' "common-sense core of meaning . . . that criminal juries should be capable of understanding" ' "].)

B. The Trial Court Had No Sua Sponte Obligation To Delete Inapplicable Mitigating Factors From CALJIC No. 8.85

Clark contends that the trial court had a sua sponte obligation to delete inapplicable mitigating factors, including factors (e), (f), and (g)[56] from

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55. Penal Code section 190.3, pertinently provides that a penalty phase jury may consider:

> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.

56. The factors identified by Clark as inapplicable include:

> (e) Whether or not the victim was a participant in the

CALJIC No. 8.85 as provided to the jury at the penalty phase retrial in violation of the Eighth Amendment. (AOB 714-717.) This Court has previously held that a trial court is not required to delete inapplicable aggravating factors where, as here, the penalty phase jury was properly instructed to consider and be guided by all the factors " 'if applicable,' " since "we assume the jury properly followed the instruction and concluded that mitigating factors not supported by evidence were simply not 'applicable.'" (*People v. Maury*, *supra*, 30 Cal.4th at p. 439; accord *People v. Montiel* (1993) 5 Cal.4th 877, 937, fn. 31.) Further, in this case, the jury, at Clark's request, was instructed that "[t]he absence of a statutory mitigating factor does not constitute an aggravating factor" (13 CT 4856), rendering it even more unlikely that the jury could have given any undue consideration to inapplicable mitigating factors. There was no error.

C. The Trial Court Was Not Required To Instruct The Jury Which Factors Were Aggravating And Which Factors Were Mitigating

Clark contends that the trial court's failure to inform the jury which factors in CALJIC No. 8.85 were aggravating and which were mitigating rendered his death sentence unconstitutionally arbitrary and inconsistent. As discussed in Arguments LXVI(C) and LXIV(C), *ante*, there is no constitutional requirement that the trial court so instruct the jury at the penalty phase. (*People v. Brown*, *supra*, 33 Cal.4th at p. 402 [no requirement that the court identify

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defendant's homicidal conduct or consented to the homicidal act.

(f) Whether or not the offense was committed under circumstances which the defendant reasonably believed to be a moral justification or extenuation for his conduct.

(g) Whether or not the defendant acted under extreme duress or under the substantial domination of another person.

(CALJIC No. 8.85.)

which factors are aggravating/mitigating or instruct that certain factors can only be considered in mitigation]; see also *People v. Vieira*, *supra*, 35 Cal.4th at p. 299; *People v. Young*, *supra*, 34 Cal.4th at p. 1226; *People v. Espinoza*, *supra*, 3 Cal.4th at p. 827.)

D. The Trial Court Was Not Required To Instruct The Jury Not To Consider Non-Statutory Aggravating Factors

Clark contends that the trial court improperly failed to instruct the jury that it could not consider non-statutory aggravating factors in arriving at its penalty determination. (AOB 719-720.) This Court rejected the identical argument in *People v. Yeoman*, *supra*, 31 Cal.4th at p. 156, explaining,

> Nothing in the instructions given by the court suggested the jury might properly consider nonstatutory aggravating factors. In fact, the court strongly suggested the contrary by directing the jury to "consider, and take into account and be guided by the applicable factors of aggravating and mitigating circumstances upon which you have been instructed." (CALJIC No. 8.88.) CALJIC No. 8.85 freed the jury to consider nonstatutory mitigating factors by explaining section 190.3, factor (k), but no instruction did the same for aggravating factors.

(See also *People v. Taylor* (2001) 26 Cal.4th 1155, 1179.)

The jury here received the same instructions found by this Court to be proper in *Yeoman*. (13 CT 4856, 4867.) Further, there is nothing in the record to indicate that the prosecutor argued non-statutory aggravating factors to the jury as a basis for imposing a death sentence. Clark's claim is without merit.

E. Penal Code Section 190.3 Factors (d) And (h) Are Not Unconstitutionally Vague

Clark challenges two of the aggravating factors set forth in Penal Code section 190.3 and CALJIC No. 8.85, factors (d) and (h),[57] as being unconstitutionally vague in violation of the Eighth and Fourteenth Amendments. (AOB 720-725.) Clark's claim has previously been rejected by this Court. (*People v. Taylor*, *supra*, 26 Cal.4th at p. 1179; *People v. Lucero* (2000) 23 Cal.4th 692, 727-728.) Clark provides no basis for reaching a different conclusion.

F. The Aggravating Factors Set Forth In Penal Code Section 190.3 And CALJIC No. 8.85 Are Not Unconstitutionally Vague

Clark contends that all of the aggravating factors identified in Penal Code section 190.3 and CALJIC No. 8.85 are unconstitutionally vague. (AOB 725-727.) This Court has previously rejected this argument and should do so here. (*People v. Horning* (2004) 34 Cal.4th 871, 913; *People v. Cole*, *supra*, 33 Cal.4th at p. 1234.)

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57. Penal Code section 190.3 pertinently provides that a jury determining penalty may consider:

> (d) Whether or not the offense was committed while the defendant was under the influence of extreme mental or emotional disturbance.
>
> (h) Whether or not at the time of the offense the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect, or the affects of intoxication.

G. Due Process Does Not Require That Aggravating Factors Be Found True Beyond A Reasonable Doubt

Clark contends that Penal Code section 190.3 and CALJIC No. 8.85 violate due process by not requiring the jury's penalty phase determination to be made by proof beyond a reasonable doubt. (AOB 726-729.) As discussed in Argument LXV(C), *ante*, this Court has previously rejected the identical argument and should do so here. (*People v. Prieto*, *supra*, 30 Cal.4th at pp. 262-263; *People v. Snow*, *supra*, 30 Cal.4th at p. 126; *People v. Anderson*, *supra*, 25 Cal.4th at pp. 589-590.)

H. The Eighth And Fourteenth Amendments Do Not Require Intercase Proportionality Review Of Death Sentences

Clark contends that California's death penalty statute violates the Eighth and Fourteenth Amendments by not requiring intercase proportionality review. (AOB 730-733.) As discussed in Argument LXV(C), *ante*, this Court has previously rejected this claim and should do so here. (*People v. Brown*, *supra*, 33 Cal.4th at p. 402; *People v. Prieto*, *supra*, 30 Cal.4th at p. 276.)

I. The Eighth And Fourteenth Amendments Do Not Require California Afford Capital Defendants With The Same Procedural Safeguards As Other Jurisdictions

Clark contends that California's failure to provide certain penalty phase procedural safeguards commonly employed in other jurisdictions violates the Eighth and Fourteenth Amendments. (AOB 733-735.) These procedural safeguards include:

> 1) written findings as to the aggravating factors found by the jury; 2) proof beyond a reasonable doubt of the aggravating factors; 3) jury unanimity on the aggravating factors; 4) a finding that aggravating factors outweigh mitigating factors beyond a reasonable doubt; 5) a finding that death is the appropriate punishment beyond a reasonable

doubt; 6) a procedure to enable the reviewing court to meaningfully review the sentencer's decision; and 7) definition of which specified relevant factors are aggravating, and which are mitigating.

(AOB 734, fn. 82.)

As discussed in Argument LXV(C), *ante*, which is incorporated herein by reference, this Court has consistently rejected these claims and should do so here.

J. California's Death Penalty Statute Adequately Narrows The Class Of Persons Eligible For The Death Penalty

Clark contends that California's death penalty statute is unconstitutional because it fails to adequately narrow the class of persons eligible for the death penalty. (AOB 735-738.) As discussed in Argument LXV(A), *ante,* which is incorporated herein by reference, Clark's claim is without merit.

K. The Lack Of Statewide Capital Case Charging Guidelines Does Not Permit Arbitrary Imposition Of The Death Penalty

Clark contends the lack of statewide standards to guide prosecutors in charging capital cases allows the death penalty to be imposed arbitrarily in violation of the Eighth and Fourteenth Amendments. As will be discussed more fully in Argument LXX, *post*, this Court has previously rejected this claim and should do so here. (*People v. Brown*, *supra*, 33 Cal.4th at p. 403; *People v. Ochoa*, *supra*, 26 Cal.4th at p. 462; *People v. Ray*, *supra*, 13 Cal.4th at p. 359.)

LXVII.

PENAL CODE SECTION 190.3 FACTORS (A), (B), AND (I) ARE NOT UNCONSTITUTIONALLY VAGUE

Clark attacks three of the aggravating factors set forth in Penal Code section 190.3, factors (a), (b), and (i),[58/] as being unconstitutionally vague. (AOB 743-755.) As discussed in Argument LXVI(A), *ante*, both the United States Supreme Court and this Court have previously rejected a vagueness challenge to factors (a), (b), and (i). (*People v. Williams*, *supra*, 16 Cal.4th at pp. 267-268, citing *Tuilaepa v. California*, *supra*, 512 U.S. 967 [114 S.Ct. 2630, 129 L.Ed.2d 750] [factors (a), (b), and (i) not unconstitutionally vague because they possess " ' "common-sense core of meaning . . . that criminal juries should be capable of understanding" ' "].) Clark's claim is without merit.

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58. Penal Code section 190.3 pertinently provides that a jury determining penalty may consider:

> (a) The circumstances of the crime of which the defendant was convicted in the present proceeding and the existence of any special circumstances found to be true pursuant to Section 190.1.
>
> (b) The presence or absence of criminal activity by the defendant which involved the use or attempted use of force or violence or the express or implied threat to use force or violence.
>
> ¶ . . .¶
>
> (i) The age of the defendant at the time of the crime.

LXVIII.

CLARK'S SENTENCE OF DEATH BASED ON HIS PIVOTAL PARTICIPATION IN, AND ULTIMATE RESPONSIBILITY FOR, THE MURDERS OF BOTH KATHY LEE AND ARDELL WILLIAMS DOES NOT SHOCK THE CONSCIENCE OR OFFEND FUNDAMENTAL NOTIONS OF HUMAN DIGNITY AND IS NOT DISPROPORTIONATE TO HIS INDIVIDUAL CULPABILITY

Clark contends that his death sentence was disproportionate to his individual culpability and that of his accomplices under intracase proportionality review. (AOB 756-762.) However, Clark's sentence of death based on his pivotal participation in, and ultimate responsibility for, the murders of both Kathy Lee and Ardell Williams does not shock the conscience or offend fundamental notions of human dignity and is not disproportionate to his individual culpability.

Although a capital defendant has no federal constitutional right to intercase proportionality review of his death sentence, article I, section 17 of the California Constitution entitles such a defendant, on request, to intracase proportionality review by this Court "to determine whether the death penalty is grossly disproportionate to his personal culpability." (*People v. Anderson*, *supra*, 25 Cal.4th at p. 602.)

When conducting intracase proportionality review, this Court must,

> "examine the circumstances of the offense, including its motive, the extent of the defendant's involvement in the crime, the manner in which the crime was committed, and the consequences of the defendant's acts. The court must also consider the personal characteristics of the defendant, including age, prior criminality, and mental capabilities. [Citation.] If the court concludes that the penalty imposed is 'grossly disproportionate to the defendant's individual culpability' [citation], or, stated another way, that the punishment ' " 'shocks the conscience and offends fundamental notions of human dignity' " ' [citation], the court must invalidate the sentence as unconstitutional." [Citation.]

(*People v. Maury*, *supra*, 30 Cal.4th at p. 441.) However, in conducting intracase proportionality review, this Court does not consider the guilt, culpability, or punishment of third parties. (*Id.* at pp. 441-442.)

Clark's death sentence is not disproportionate to his individual culpability in the murders of Kathy Lee and Ardell Williams and his sentence certainly does not shock the conscience or offend fundamental notions of human dignity. While Clark seeks to minimize his participation in the murders of Kathy Lee and Ardell Williams, specifically noting that he did not personally shoot either victim, he ignores the fact that Clark was the pivotal participant in both crimes. Clark very meticulously planned the burglary of the Comp USA store that led to Kathy Lee's murder. Clark arranged Ardell Williams's murder while in county jail to prevent her from testifying against him. Absent Clark's involvement, both victims would be alive today. There is nothing disproportionate about his punishment. (See *People v. Allen*, *supra*, 42 Cal.3d at p. 1286 [defendant who arranged murders of former witnesses while incarcerated could not "credibly assert that the punishment imposed [was] disproportionate to his individual culpability."].)

LXIX.

THE TRIAL COURT WAS NOT REQUIRED TO DEFINE THE TERMS "DEATH" AND "LIFE WITHOUT THE POSSIBILITY OF PAROLE" FOR THE JURY)

Clark contends that the trial court had a sua sponte obligation to define the terms "life without possibility of parole" and "death" as used in CALJIC No. 8.84 because of a "common perception that jurors do not believe that persons sentenced to die will be executed or that persons sentenced to serve life without parole will spend their entire lives in prison." (AOB 763-769.) This Court has previously rejected the identical claim. (*People v. Holt*, *supra*, 15

Cal.4th at pp. 687-689.) As this Court noted in *Holt*,

> An instruction, such as that proposed by defendant, advising the jury that a defendant could never be released on parole if sentenced to life without the possibility of parole would be erroneous, since gubernatorial pardon and/or commutation of the sentence is permitted (Cal. Const., art. V, § 8; Pen.Code, § 4800) and it is always possible that the present death penalty law or the sentencing provisions of the law might be invalidated in the future. [Citations.] An instruction accurately advising the jury that the "real consequences" of a sentence of life without possibility of parole include those possibilities might prejudice a capital defendant. Were a jury advised of the possibility of release notwithstanding the "without possibility of parole" aspect of the life term, it might opt instead for death.
>
> Defendant's observation that jurors sometimes ask whether a term of life without possibility of parole means what it says or if the defendant may ever be before a parole board or be released [citations], and his argument that the jury should be told that under a life without parole sentence the defendant cannot be granted parole and the sentence will result in actual imprisonment for the rest of the defendant's life confirms that his claim is not directed to the technical meaning of the term. Instead, his argument is actually that, in light of juror skepticism that a sentence of life without parole will be carried out as imposed, the court must instruct the jury sua sponte that if the defendant is sentenced to that term he will never be released. It is not an argument that the term has a technical meaning, but an argument that the court must instruct even though the meaning is perfectly clear that if the law changes in the future, or if the Governor exercises the constitutional power of commutation or pardon, the sentence might not be carried out as imposed. (The same is true of the death penalty, of course.)

(*People v. Holt*, *supra*, 15 Cal.4th at pp. 688-689.)

There was no error.

LXX.

THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION DOES NOT REQUIRE UNIFORM CHARGING GUIDELINES IN CAPITAL CASES

Clark contends that California's death penalty statute violates the equal protection guarantee of the United States Constitution by failing to provide uniform standards to guide prosecutors in their decisions whether to seek the death penalty. (AOB 770-805.) This claim is without merit.

With respect to his claim that California's death penalty statute violates the federal Constitution's equal protection guarantee, Clark argues that equal protection requires California to provide uniform standards to guide prosecutors in their decisions whether to seek the death penalty. (AOB 773-805.) This Court has previously held that California's death penalty law is not "constitutionally deficient because the prosecutor retains discretion whether or not to seek the death penalty." (*People v. Brown*, *supra*, 33 Cal.4th at p. 403; *People v. Ochoa*, *supra*, 26 Cal.4th at p. 462; *People v. Ray*, *supra*, 13 Cal.4th at p. 359.)

Without addressing the prior decisions of this Court rejecting his argument, Clark contends the United States Supreme Court, in deciding *Bush v. Gore* (2000) 531 U.S. 98 [121 S.Ct. 525, 148 L.Ed.2d 388], articulated a new standard of equal protection analysis whereby a death penalty statute must establish uniform charging guidelines for prosecutors to avoid arbitrary imposition of the death penalty in order to pass constitutional muster.

In the first instance, *Bush v. Gore* involved a constitutional challenge to Florida's voting procedures. (*Id.* at p. 103.) The case did not involve the constitutional rights of capital defendants. " 'It is axiomatic that cases are not authority for propositions not considered.' " (*People v. Avila*, *supra*, 38 Cal.4th at p. 567.) The question of the equal protection rights of capital defendants was

not before the High Court in *Bush v. Gore* and the court's decision in that case cannot be construed as authority for a proposition not considered by the court in the case. (See *Ibid.*)

Moreover, judicially or legislatively imposed "guidelines" limiting the exercise of a prosecutor's charging decisions in a capital case would violate separation of powers principles.

> "[T]he prosecuting authorities, exercising executive functions, ordinarily have the sole discretion to determine whom to charge with public offenses and what charges to bring. [Citations.] This prosecutorial discretion to choose, for each particular case, the actual charges from among those potentially available arises from ' "the complex considerations necessary for the effective and efficient administration of law enforcement." ' [Citations.] The prosecution's authority in this regard is founded, among other things, on the principle of separation of powers, and generally is not subject to supervision by the judicial branch. [Citations.]" [Citation.]

(*Manduley v. Superior Court* (2002) 27 Cal.4th 537, 552.)

Accordingly, as this Court has previously noted, prosecutorial discretion in charging death penalty cases does not violate equal protection principles and to limit that discretion would violate the constitutional separation of powers. Further, as discussed in Argument LXV(B), *ante*, California's death penalty law is not arbitrarily and capriciously applied once charged, thereby protecting the equal protection rights of capital defendants. Clark's claim is without merit.

LXXI.

CALIFORNIA'S DEATH PENALTY LAW IS NOT ARBITRARY IN VIOLATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Clark contends that California's death penalty law violates international law because it is imposed arbitrarily as that term is defined under the International Covenant on Civil and Political Rights (ICCPR). (AOB 806-810.)

However, this Court has rejected challenges based on alleged violations of the ICCPR and should do so here.

Initially, as discussed in Argument LXV(E), *ante*, Clark lacks standing to challenge California's death penalty statute as violating international law. (See *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, *supra*, 859 F.2d at p. 937; see also *People v. Brown*, *supra*, 33 Cal.4th at p. 403, citing *Hanoch Tel-Oren v. Libyan Arab Republic*, *supra*, 517 F.Supp. at pp. 545-547.) Accordingly, this Court should reject Clark's contention as he lacks standing to challenge California law on international law grounds.

Further, this Court has previously rejected the claim that California's death penalty law violates the ICCPR. (*People v. Brown*, *supra*, 33 Cal.4th at pp. 403-404; see also *People v. Wilson*, *supra*, 36 Cal.4th at p. 362.) As this Court noted in *Brown*,

> Although the United States is a signatory [to the ICCPR], it signed the treaty on the express condition "[t]hat the United States reserves the right, subject to its Constitutional constraints, to impose capital punishment on any person (other than a pregnant woman) duly convicted under existing or future laws permitting the imposition of capital punishment, including such punishment for crimes committed by persons below eighteen years of age." (138 Cong. Rec. S4781-01 (Apr. 2, 1992); see Comment, The Abolition of the Death Penalty: Does "Abolition" Really Mean What You Think It Means? (1999) 6 Ind. J. Global Legal Studies 721, 726 & fn. 33.) Given states'sovereignty in such matters within constitutional limitations, our federal system of government effectively compelled such a reservation.

(*Ibid.*) Clark fails to address this Court's prior decision in *Brown*.

In short, Clark has no standing to invoke international law as a basis for challenging his judgment of death and, in any event, California's death penalty law does not violate the ICCPR. Accordingly, Clark's claim should fail.

LXXII.

CALIFORNIA'S DEATH-QUALIFICATION PROCEDURES IN JURY SELECTION DOES NOT RESULT IN A DEATH-ORIENTED JURY IN VIOLATION OF THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS

Clark contends that California's death penalty law violates Article 14 of the ICCPR because the death-qualification procedures utilized in jury selection "unfairly skewed the jury-pool to conviction-prone and death-prone jurors." (AOB 811-814.) He is mistaken.

Initially, as discussed in Argument LXV(E), *ante*, Clark lacks standing to challenge California's death penalty statute as violating international law. (See *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, *supra*, 859 F.2d at p. 937; see also *People v. Brown*, *supra*, 33 Cal.4th at p. 403, citing *Hanoch Tel-Oren v. Libyan Arab Republic*, *supra*, 517 F.Supp. at pp. 545-547.) Accordingly, this Court should reject Clark's contention as he lacks standing to challenge California law on international law grounds.

Further, as discussed in Argument LXXI, *ante*, this Court has previously rejected the claim that California's death penalty law violates the ICCPR. (*People v. Brown*, *supra*, 33 Cal.4th at pp. 403-404; see also *People v. Wilson*, *supra*, 36 Cal.4th at p. 362.) Clark utterly fails to address this Court's prior decision in *Brown*.

Additionally, as discussed in Argument XIX, *ante*, the jurors in both the guilt and penalty phases did not exhibit an impermissible pro-death bias. Further, this Court has previously rejected "the suggestion that the death qualification process is impermissible because it results in a death-oriented jury." (*People v. Clark* (1990) 50 Cal.3d 583, 597.) Clark's claim is without merit and should be rejected.

LXXIII.

SINCE CALIFORNIA'S DEATH PENALTY LAW DOES NOT VIOLATE THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS AND INTERNATIONAL LAW WILL ULTIMATELY HAVE NO BEARING ON THE INSTANT STATE COURT PROCEEDINGS, A STAY TO SEEK INTERNATIONAL REVIEW IS UNWARRANTED

Clark contends that if this Court denies his claims, he should receive a stay of execution to permit international review of alleged violations of the ICCPR. In the alternative, Clark asks for a determination by this Court specifying its refusal to grant this request so that he may seek international review now. (AOB 815-818.) Clark's claim should be rejected, as he is not legally entitled to a stay to permit review by an international tribunal.

Initially, as discussed in Argument LXV(E), *ante*, Clark lacks standing to challenge California's death penalty statute as violating international law. (See *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, *supra*, 859 F.2d at p. 937; see also *People v. Brown*, *supra*, 33 Cal.4th at p. 403, citing *Hanoch Tel-Oren v. Libyan Arab Republic*, *supra*, 517 F.Supp. at pp. 545-547.) Accordingly, this Court should reject Clark's contention as he lacks standing to challenge California law on international law grounds.

Further, as discussed in Argument LXXI, *ante*, this Court has previously rejected the claim that California's death penalty law violates the ICCPR. (*People v. Brown*, *supra*, 33 Cal.4th at pp. 403-404; see also *People v. Wilson*, *supra*, 36 Cal.4th at p. 362.) Clark fails to address this Court's prior decision in *Brown*.

Since international law will ultimately have no bearing on the instant state court proceedings, a stay to seek international review is unwarranted. (See *In re Hicks* (11th Cir. 2004) 375 F.3d 1237, 1241, fn. 2.) Clark does not have a judicially enforceable private right for relief under any international treaties.

(Cf. *Garza v. Lapin* (7th Cir. 2001) 253 F.3d 918, 924.) Thus, Clark's claim should be rejected.

LXXIV.

CLARK'S TRIAL DID NOT VIOLATE INTERNATIONAL LAW

Clark claims that various aspects of his trial and penalty phase determinations violated customary international law and related international legal instruments, including the Universal Declaration of Human Rights, the ICCPR, the American Declaration of the Rights and Duties of Man, and the International Convention Against All Forms of Racial Discrimination. (AOB 819-840.) However, this Court has previously rejected the identical claim and should do so here.

Initially, as discussed in Argument LXV(E), *ante*, Clark lacks standing to challenge California's death penalty procedures as violating international law. (See *Committee of U.S. Citizens Living in Nicaragua v. Reagan*, *supra*, 859 F.2d at p. 937; see also *People v. Brown*, *supra*, 33 Cal.4th at p. 403, citing *Hanoch Tel-Oren v. Libyan Arab Republic*, *supra*, 517 F.Supp. at pp. 545-547.) Accordingly, this Court should reject Clark's contention as he lacks standing to challenge the application of California law on international law grounds.

This Court has previously rejected the identical claim in *People v. Hillhouse*, *supra*, 27 Cal.4th at p. 511. As in *Hillhouse*, Clark here " 'has failed to establish the premise that his trial involved violations of state and federal constitutional law. . . .' " or that " 'his rights to due process of law and to be free from invidious discrimination on the basis of race have been violated.'" (See *Ibid.*) Clark fails to address *Hillhouse*. Thus, this Court should reject Clark's claim.

LXXV.

CLARK'S TRIAL WAS NOT CLOSELY BALANCED AT EITHER THE GUILT AND PENALTY PHASES AND THERE WERE NO ERRORS, INDIVIDUALLY OR CUMULATIVELY WARRANTING A NEW TRIAL

Clark contends that both his guilt and penalty phase trials were so closely balanced that the cumulative effect of the errors he alleges occurred throughout the proceedings requires reversal of the judgment and a new trial. (AOB 841-843.) However, as discussed previously, the circumstantial evidence against Clark was overwhelming and there was nothing "close" about his case. Further, the record simply does not support his characterization of the case against him as being "created rather than discovered." (AOB 841.)

As discussed in Arguments I through LXXIV, *ante*, Clark has failed to establish error in his trial. Further, even assuming error occurred, as discussed previously, any errors were harmless.

This case was tried with skill and professionalism by both sides, before a judge meticulous in her fairness. Clark has simply failed to show cumulative prejudicial error. (See *People v. Seaton* (2001) 26 Cal.4th 598, 675, 691-692 [few errors identified were minor and either individually or cumulatively would not alter the outcome of the trial]; *People v. Catlin* (2001) 26 Cal.4th 81, 180 [same]; *People v. Cudjo*, *supra*, 6 Cal.4th at p. 630 [no cumulative error when the few errors which occurred during the trial were inconsequential].)

Whether considered individually or for their cumulative effect, none of the errors alleged affected the process or accrued to Clark's detriment. (*People v. Sanders*, *supra,* 11 Cal.4th at p. 565; *People v. Cudjo*, *supra*, 6 Cal.4th at p. 637.) As this Court has noted, "[Clark] was entitled to a fair trial but not a perfect one." (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1009.) Clark's trial was more than fair.

LXXVI.

CALIFORNIA'S DEATH PENALTY LAW DOES NOT VIOLATE THE UNITED STATES CONSTITUTION BECAUSE ANY DELAY INHERENT IN THE APPELLATE PROCESS SERVES TO SAFEGUARD CLARK'S CONSTITUTIONAL RIGHTS AND IS NOT CRUEL AND UNUSUAL PUNISHMENT

Clark contends that the lengthy delay between imposition of sentence and execution violates the Eighth and Fourteenth Amendments of the United States Constitution because it constitutes cruel and unusual punishment. (AOB 844-849.) However, this Court has consistently found that any delay inherent in the appellate process serves to safeguard a defendant's constitutional rights and should therefore reject Clark's contention.

First, Clark relies on the memorandum opinion of Justice Stevens in *Lackey v. Texas* (1995) 514 U.S. 1045 [115 S.Ct. 1421, 131 L.Ed.2d 304] (mem. opn. of Stevens, J., on denial of cert.), setting forth his view that Lackey's claim that the lengthy delay between the imposition of his death sentence and his execution violated the Eighth Amendment's prohibition against cruel and unusual punishment was a novel and undecided claim worthy of consideration by the United States Supreme Court. (AOB 845-849.) However, it is important to note that certiorari was denied in that case and that only Justice Breyer joined Justice Stevens in his opinion. Accordingly, the issue remains an open question unaddressed by the United States Supreme Court and Clark's reliance on *Lackey* does not support his position.

Further, this Court has repeatedly rejected the identical constitutional challenge to sentences of death. (*People v. Brown*, *supra*, 33 Cal.4th at p. 404; *People v. Ochoa*, *supra*, 26 Cal.4th at pp. 462-463; *People v. Anderson*, *supra*, 25 Cal.4th at p. 606; *People v. Massie* (1998) 19 Cal.4th 550, 574; *People v. Hill* (1992) 3 Cal.4th 959, 1016.) As this Court observed in *Anderson*, "the automatic appeal process following judgments of death is a constitutional

safeguard, not a constitutional defect." (*People v. Anderson*, *supra*, 25 Cal.4th at p. 606.) Similarly, this Court has previously held that execution notwithstanding the delay inherent in the appellate process furthers both the deterrent and retributive purposes of punishment. (*People v. Ochoa*, *supra*, 26 Cal.4th at p. 463.) Clark fails to address the many prior decisions of this Court rejecting this contention.

As the numerous prior decisions of this Court demonstrate, California's death penalty law does not violate the Eighth and Fourteenth Amendments of the United States Constitution because any delay inherent in the appellate process serves to safeguard Clark's constitutional rights and is not cruel and unusual punishment. Accordingly, Clark's claim should fail.

LXXVII.

CLARK'S CHALLENGE TO THE METHOD OF EXECUTION DOES NOT AFFECT THE VALIDITY OF HIS SENTENCE AND, REGARDLESS, CALIFORNIA'S USE OF LETHAL INJECTION AS A METHOD OF EXECUTION DOES NOT VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS

Clark contends that California's use of lethal injection as a means of execution violates the Eighth and Fourteenth Amendments of the United States Constitution because lethal injection constitutes cruel and unusual punishment. (AOB 850-864.) However, this Court has consistently rejected the identical claim and should do so here.

First, Clark's contention that execution by means of lethal injection violates the Eighth and Fourteenth Amendments should be summarily rejected by this Court because "[i]t bears solely on the legality of the execution of the sentence and not on the validity of the sentence itself. [Citation.]" (*People v. Bradford* (1997)14 Cal.4th 1005, 1059.) However, even assuming this Court

should entertain the merits of the claim, California's use of lethal injection as a means of execution does not violate the Eighth and Fourteenth Amendments.

Penal Code section 3604, subdivision (a), provides:

> The punishment of death shall be inflicted by the administration of a lethal gas or by an intravenous injection of a substance or substances in a lethal quantity sufficient to cause death, by standards established under the direction of the Department of Corrections.[59]

Clark contends that execution by lethal injection is cruel and unusual punishment. Alluding to matters outside the record, Clark describes instances in which there were complications or mishaps in the use of lethal injections. (AOB 852-862.) In rejecting a similar claim, the Ninth Circuit concluded, ' "[t]he risk of accident cannot and need not be eliminated from the execution process in order to survive constitutional review.' " (*LaGrand v. Stewart* (9th Cir. 1998) 133 F.3d 1264-1265, quoting *Campbell v. Wood* (9th Cir. 1994) 18 F.3d 662, 687; accord, *Cooper v. Rimmer* (9th Cir. 2004) 379 F.3d 1029, 1033.) In fact, a punishment is not,

> cruel and unusual simply because it causes death, or because there may be some pain associated with death. "Punishments are cruel when they involve torture or a lingering death. . . ." [Citation.] As used in the Constitution, "cruel" implies "something inhuman and barbarous, something more than the mere extinguishment of life." [Citation.] "The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary

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59. Clark notes that California's use of lethal gas as a means of execution was found by the Ninth Circuit to violate the Eighth and Fourteenth Amendments in *Fierro v. Gomez* (9th Cir. 1996) 77 F.3d 301. (AOB 850.) However, the United States Supreme Court vacated the judgment in *Fierro* and remanded the case to the Ninth Circuit to consider the amendment to Penal Code section 3604 making lethal injection the default method of execution in California. (*Fierro v. Gomez* (1996) 519 U.S. 918 [117 S.Ct. 285, 136 L.Ed.2d 204].) On remand, the Ninth Circuit found the plaintiffs lacked standing to challenge the constitutionality of lethal gas as a method of execution since, under Penal Code section 3604, the plaintiffs were subject to execution by lethal injection. (*Fierro v. Terhune* (9th Cir. 1998) 147 F.3d 1158, 1160.)

> suffering involved in any method employed to extinguish life humanely." [Citation.]

(*Campbell v. Wood*, *supra*, 18 F.3d at p. 683.)

In addition to the Ninth Circuit, this Court has repeatedly rejected the identical constitutional challenge to California's use of lethal injection as a method of execution. (*People v. Carter* (2005) 36 Cal.4th 1114, 1213; *People v. Young*, *supra*, 34 Cal.4th at p.1234; *People v. Samayoa* (1997) 15 Cal.4th 795, 864.) Clark fails to address the many prior decisions of this Court on the subject.

In short, Clark's claim should be summarily rejected because it bears on the validity of the execution of sentence and not on the validity of the sentence itself. In any event, California's death penalty law does not violate the Eighth and Fourteenth Amendments of the United States Constitution because the use of lethal injection as a means of execution is not cruel and unusual punishment. Accordingly, Clark's claim should fail.

LXXVIII.

EVEN ASSUMING THERE WAS ERROR IN CLARK'S TRIAL, ANY ERROR WAS HARMLESS EVEN WHEN CONSIDERED CUMULATIVELY

Similar to Argument LXXV, *ante*, Clark contends the cumulative effect of errors in the guilt and penalty phases of his trial requires reversal of the death judgment. (AOB 865-871.) However, as discussed in Arguments I through LXXVII, *ante*, Clark has failed to establish error in his trial. Further, even assuming error occurred, as discussed above, any errors were harmless.

This case was tried with skill and professionalism by both sides, before a judge meticulous in her fairness. Clark has simply failed to show cumulative prejudicial error. (See *People v. Seaton*, *supra*, 26 Cal.4th at pp. 691-692 [few errors identified were minor and either individually or cumulatively would not

alter the outcome of the trial]; *People v. Catlin*, *supra*, 26 Cal.4th at p. 180 [same]; *People v. Cudjo*, *supra*, 6 Cal.4th at p. 630 [no cumulative error when the few errors which occurred during the trial were inconsequential].)

Whether considered individually or for their cumulative effect, none of the errors alleged did not affect the process or accrue to Clark's detriment. (*People v. Sanders*, *supra*, 11 Cal.4th at p. 565; *People v. Cudjo*, *supra*, 6 Cal.4th at p. 637.) As this Court has noted, "[Clark] was entitled to a fair trial but not a perfect one." (*People v. Cunningham*, *supra*, 25 Cal.4th at p. 1009.) Clark's trial was more than fair.

CONCLUSION

For the foregoing reasons, Respondent respectfully asks that the judgment as to both guilty and penalty be affirmed.

Dated: October 11, 2006

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that the attached RESPONDENT'S BRIEF uses a 13 point Times New Roman font and contains 83,024 words.

Dated: October 11, 2006

Respectfully submitted,

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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: ***People v. William Clinton Clark*** No.: **S066940**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On October 16, 2006, I served the attached **respondent's brief** by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 110 West "A" Street, Suite 1100, San Diego, California 92101, addressed as follows:

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I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on October 16, 2006, at San Diego, California.

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